STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, d/b/a Ameritech Illinois	)	
	)	**Docket No. 00-0393**
Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service	)	

AMERITECH ILLINOIS' BRIEF ON REHEARING

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Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") respectfully submits its Brief on Rehearing.[1]

EXECUTIVE SUMMARY

This is a rehearing of the Commission's March 14, 2001 Order ("Order") requiring Ameritech Illinois to "unbundle," and allow "collocation" of line cards in, the facilities that would be deployed for DSL service as part of SBC's Project Pronto. Ameritech Illinois sought rehearing on both legal and factual grounds, explaining that the Order as it stands makes deployment of Project Pronto DSL facilities infeasible in Illinois. On rehearing, Ameritech Illinois submitted detailed testimony on the policy, economic, and technical issues raised by the Order's Project Pronto requirements in hopes of convincing the Commission to change the Order in a way that complies with current law and sound public policy by removing those requirements and making it feasible to deploy Project Pronto DSL facilities in Illinois. Deployment would create significant pro-consumer and pro-competitive benefits by significantly extending the reach of DSL capability and giving consumers a viable competitive alternative to cable modem broadband service, which currently holds almost 85% of the broadband market in Illinois. Am. Ill. Rhg. Ex. 8.0 (Aron) at 16. Non-deployment, on the other hand, would deny consumer choice, deter advanced services investment, and thwart competition in this important market. The decision in this case thus will largely determine the future of advanced services deployment and competition in Illinois.

[1] Attachment A hereto is a separate document that responds to the questions propounded by Commissioner Squires regarding the issues on rehearing. *See* May 11, 2001 Notice of attached questions.

1. Ameritech Illinois has never had and cannot obtain anything like monopoly control in the advanced services market.[2] To the contrary, it is widely recognized that the broadband services market includes multiple delivery technologies and providers for the same service – cable modem service providers, DSL providers, wireless providers, and satellite providers[3] – and that there is no separate, insulated market for DSL service alone.[4] Although this Commission does not exercise jurisdiction over cable modem, wireless, and satellite service providers, which remain largely unregulated, those providers are significant to the legal and policy analysis here. Indeed, it is precisely this inability to ensure equal regulatory treatment of all players in the competitive market that should lead the Commission to proceed cautiously[5] and, ideally, leave it to the FCC – which has the necessary jurisdiction – to establish a uniform

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[2] The FCC has concluded that the "preconditions for monopoly appear absent" in the advanced services arena (Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket 98-146, FCC 99-5, ¶ 48 (rel. Feb. 2, 1999) ("*First Advanced Services Report"*)) in light of "the competitive nature of the broadband market," the "number of consumer broadband options within the various broadband technologies," and the existence of "price competition" between technologies. Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, CC Docket 92-297, FCC 00-233, ¶ 23 (rel. June 27, 2000) ("*Fixed Wireless Competition Order*").

[3] Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket 98-146, FCC 00-290, ¶¶ 29-59 (rel. Aug. 21, 2000) ("*Second Advanced Services Report"*) (discussing competing technologies); *Fixed Wireless Competition Order*, ¶¶ 19, 23 (referring to "a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless").

[4] Am. Ill. Rhg. Ex. 8.0 (Aron) at 14-28; Am. Ill. Rhg. Ex. 11.0 (Levin) at 7-11; Am. Ill. Rhg. Ex. 2.0 (Crandall) at 6-10; *First Advanced Services Report*, ¶ 48; *Second Advanced Services Report*, ¶¶ 29-59; J. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (Winter 2000); J. Epstein, *A Lite Touch on Broadband: Achieving the Optimal Regulatory Efficiency in the Internet Broadband Market*, 38 Harv. J. on Legis. 37, 44-49 (Winter 2001). Marketing materials from both cable modem and DSL providers emphasize the direct competition between the two. Am. Ill. Rhg. Ex. 8.0 (Aron) at 13-14 (citing sources).

[5] Opening Statement of Michael K. Powell, Chairman, Federal Communications Commission, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, at 2, March 29, 2001 ("Powell 3/29/01 Testimony") (The FCC's core concern under the Act is how to "harmonize and rationalize regulations across industry segments" and "endeavor to promote the growth of a *wide variety of technologies that can compete with each other"* while "striv[ing] not to favor – *or uniquely burden* – any particular one") (included in Ameritech Illinois' Rehearing Appendix, Tab 2); Brief of the Federal Communications Commission as Amicus Curiae, at 29, *AT&T Corp. v. City of Portland*, No. 99-35609 (filed Aug. 16, 1999) (included in Ameritech Illinois' Rehearing Appendix, Tab 6).

broadband policy.[6]

The nature and status of the broadband market are significant for many reasons. This is a new and emerging market where any competitor, regardless of the technology it uses, must invest in and deploy new facilities to provide advanced services. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 3, 16-17. All such investments are risky. Furthermore, cable modem service providers have a substantial market-share lead and DSL is trying to catch up. This is one of the motivators for the Project Pronto investment, which is primarily aimed at bringing high-speed Internet access service to the mass market of small business and residential customers. *Id*. at 6-9.[7] Asymmetric regulations that burden and discourage deployment of DSL facilities, however, will severely handicap DSL providers in this catch-up effort,[8] to consumers' detriment. Shackling a secondary player in the nascent broadband market while the leader and all others remains free of regulation is, to say the least, perverse. *See* Am. Ill. Rhg. Ex. 1.0 (Ireland) at 21-23. The Commission's role is not to pick winners and losers in the broadband market, but that is effectively what the Order now does. Am. Ill. Rhg. Ex. 11.0 (Levin) at 18.

The consumer benefits of widespread deployment of advanced services infrastructure are undeniable. Governor Ryan and Mayor Daley have recognized the importance of such infrastructure, particularly for high-speed Internet access, to future economic development. Am.

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[6] Statement of Chairman William E. Kennard Concerning Notice of Inquiry Into High-Speed Internet Service (FCC rel. Sept. 28, 2000) ("Any policies concerning high speed access should be decided at the national level because these services, like the broadband networks themselves, are national in scope.")

[7] Cable modem service providers (like AT&T) currently dominate the broadband services market in Illinois and elsewhere, with a market share around 85%. Am. Ill. Rhg. Ex. 8.0 (Aron) at 16-17. Industry analysts generally agree that, even under current regulatory conditions that do not require unbundling of DSL infrastructure, DSL is unlikely to catch up with the cable modem market share for several years. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 14-15.

[8] Cable companies, by contrast, have been able to fight off sharing duties based on competition in the broadband market: "On balance, having satellite competition has been good for the cable industry because it helps fight off more government regulation." Jon Van, "Cable Industry Pictures Bright Future for Itself," *Chi. Tribune*, Bus. Section, June 12, 2001 (quoting the President of the National Cable & Telecommunications Association).

Ill. Rhg. Ex. 11.0 (Levin) at 5 and Scheds. SLL-2, 3, and 4. This Commission has recognized the benefits of widespread deployment too (Order, Docket 98-0555, at 244, Merger Condition 20) as have Congress (*see* 47 U.S.C. 157 note (Section 706 of 1996 Act)) and the FCC (*First Advanced Services Report*, ¶ 2). The best way to achieve those benefits is a policy of regulatory restraint in this nascent but important market. *Id*., ¶ 5 ("We intend to rely as much as possible on free markets and private enterprise" to promote deployment.); *UNE Remand Order*, ¶ 316 (adopting "regulatory restraint" with regard to unbundling packet switching).

The reason that the Order's Project Pronto requirements render further deployment of Pronto DSL facilities infeasible in Illinois is simple. The Order's requirements would not only lead to significant increased costs for Ameritech Illinois, but at a fundamental level would deprive Ameritech Illinois of control over its $500 million-plus (or more) planned investment. This investment is in new technology in a highly competitive advanced services market and obviously would be risky even without the Order's requirements. *UNE Remand Order*, ¶ 314 ("[I]nvestments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets."). The Order, however, would create a whole new array of risks by imposing costs and preventing Ameritech Illinois from controlling the use of its investments or making market-driven adjustments to manage risk as time goes on. Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3. Loss of control of an investment naturally increases its riskiness, and the risk grows when coupled with increased costs.[9] Rhg. Tr. 1791-93, 1809 (Staihr). As AT&T's own CEO recognized:

[9] Ameritech Illinois has estimated that the Order's Project Pronto requirements could impose incremental costs on Ameritech Illinois of $500 million or more. Am. Ill. Rhg. Ex. 10.0 (Keown) at Sch. JEK-4. The CLECs spent a great deal of time attacking that analysis. As both Mr. Keown and Mr. Ireland explained, however, the analysis was performed for business planning purposes and risk assessment, and thus was in some respects a worst-case scenario or close to it. Am. Ill. Rhg. Ex. 1.1 (Ireland) at 2-3. Such analysis is exactly what prudent companies must rely on in assessing investment risk. Moreover, Sprint's own economist agreed that the Order's requirements would impose

> No company will invest billions of dollars to become a facilities-based … services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[10]

Because CLECs have no obligation to purchase anything from Ameritech Illinois, there is no guarantee that CLECs would take advantage of any of the Project Pronto requirements,[11] much less do so in significant volumes or for a long enough period to give Ameritech Illinois any hope of recovering the costs the Order imposes. Conversely, if the CLECs were to take advantage of those requirements (as they might do if prices were set so low as to as to discourage their own investment in their own facilities), they seem intent on doing so for bandwidth-hogging service to large business customers (*see* Rhg. Tr. 1431-32 (Watson)), which would impede others from using the facilities to serve the mass market customers for whom the architecture was primarily designed.

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new costs on Ameritech Illinois, that additional costs add additional risk to an investment, and that loss of control of an investment creates even more risk. Tr. 1789-91 (Staihr).

The CLECs also will argue that Mr. Keown used outdated equipment prices in his analysis. *See* Rhg. Tr. 2389-93 That is not correct, but even if it were, the prices that the CLECs claim were used are at most no more than 3% lower than the current prices. *Compare* Ameritech Illinois Response to Sprint/Covad/Rhythms Data Request 1-1 (Alcatel Price List) *with* Rhythms Rhg. Mitchell Cross Ex. 5P, Exhibit B. Given the very large dollar figures at stake, a difference of that size in some product prices would have no discernible impact on the business risk analysis. As Ameritech Illinois' Mr. Ireland explained, he would have recommended against deployment of Project Pronto DSL facilities in Illinois under the terms of the Order even if the projected new costs had been in the millions of dollars rather than the hundreds of millions. Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3-4. (Mr. Keown was questioned about both pricing documents (s*ee* Rhg. Tr. 2389-93) but Rhythms' counsel only submitted the latter as an exhibit and "represented" how the two compared. Rhg. Tr. 2390. The only way to perform an accurate comparison is to review both price lists.)

[10] Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998), available at http://www.att.com/speeches/item/0,1363,948,00.html.

[11] Indeed, SBC's ILECs have invested hundreds of millions of dollars to meet the requirement of the FCC's *Project Pronto Order*, which were imposed at the request of CLECs, but no CLEC has attempted to take advantage of those requirements. Am. Ill. Rhg. Ex. 4-1 (Boyer) at 22-23; Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3. Furthermore, there is always the chance that end-user demand for the high-bandwidth services the CLECs claim to want to offer will not materialize. The Order puts the risk of that market uncertainty on Ameritech Illinois rather than CLECs. *See UNE Remand Order*, ¶ 314 ("Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services."); Simon Romero, "Once-Bright Future of Optical Fiber Dims," *New York Times*, June 18, 2001; "Broadband Broadsided," *Christian Science Monitor*, June 21, 2001.

2. This case is straightforward as a matter of both law and policy. The FCC has already decided the key issues. *First*, it is beyond dispute that the Project Pronto DSL facilities provide packet switching functionality. *See infra* n. 21. The FCC has already applied the 1996 Act and its rules to packet switching and considered all the relevant evidence (including evidence from all the CLECs here) and competing policy considerations. *UNE Remand Order*, ¶¶ 303-17.[12] Based on that thorough analysis, the FCC concluded that packet switching cannot be required to be unbundled on a general basis, but rather can be unbundled only in the specific "limited circumstances" defined in its Rule 319(c) (47 C.F.R. 51.319), which are applied on a location-by-location basis. This Commission is not free to deviate from the FCC's application of the "impair" standard and FCC Rule 319(c).[13] The record on rehearing conclusively proves that the conditions required by the FCC's packet switching rule do not exist in Illinois. *See infra*, § I. Accordingly, the Order's requirement and the CLECs' request to unbundle the Project Pronto DSL packet switching facilities, and the companion requirement to "collocate" line cards to "access" that packet switching functionality, are unlawful.

Second, the FCC has already made a particularized policy decision regarding CLEC access to Project Pronto DSL facilities in its *Project Pronto Order.*[14] The FCC's decision was the culmination of a seven-month long proceeding in which CLECs (again, including the CLECs here) participated extensively. The CLECs made numerous demands for access to the Pronto DSL architecture. The FCC granted many of those demands by imposing several requirements

[12] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, FCC 99-238 (rel. Nov. 5, 1999).

[13] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000); *Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 775-76 (1947).

[14] Second Memorandum Opinion and Order, *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket 98-141, FCC 00-336 (rel. Sept. 8, 2000).

on SBC's ILECs. Specifically, the FCC required the SBC ILECs to (1) offer a wholesale Broadband Service to CLECs to allow end-to-end access to the Pronto DSL architecture at TELRIC-based rates and in a manner that allowed CLECs to differentiate their service offerings; (2) work with CLECs to make available existing and future features and functions of the Project Pronto DSL equipment by hosting a quarterly collaborative; (3) create space for DSLAM collocation in existing remote terminals and overbuild future-deployed RTs to ensure adequate collocation space; (4) undertake certain construction work to allow access to copper facilities running from the ILECs' RTs; and (5) maintain existing copper facilities. *Project Pronto Order*, ¶¶ 6, 30-48 and App. A. No other ILECs in the nation face such requirements.

The FCC found that its requirements would have the twin public benefits of "ensur[ing] that competitors have the ability to compete effectively in the advanced services marketplace" while also "facilitating SBC's deployment of advanced services to the mass market." *Id*., ¶ 1. The FCC thus expected that "consumers will benefit not only from a more rapid deployment of advanced services, but also from the increased choices that stem from the competitive safeguards" it imposed. *Id*., ¶ 2. Notably, the FCC also declined to adopt CLEC requests to require CLEC ownership of line cards. *See id*., ¶ 49. Given the FCC's close look at the very same issues raised by the CLECs here, and its conclusion that the consumer benefits of Pronto DSL deployment can be achieved with the conditions it adopted, there is again no basis for the Order's additional regulatory duties.

It also must be emphasized that, notwithstanding the CLECs' rhetoric and twisted logic, this case is not about access to any recognized UNE. Ameritech Illinois provides all of the UNEs required by the FCC, including the High Frequency Portion of the Loop ("HFPL") and copper, dark fiber, and lit fiber subloops and interoffice transport facilities. Ameritech Illinois

also allows DSLAM collocation in its remote terminals and central offices. Moreover, SBC's ILECs are already subject to numerous regulatory requirements to accommodate data CLECs. *Project Pronto Order*, ¶¶ 6, 30-48 and App. A. This case therefore is not about a denial of access to anything – it is about whether Ameritech Illinois will be able to deploy the Project Pronto DSL facilities at all. Deployment of Pronto DSL facilities in Illinois would do nothing but *expand* options for consumers and data CLECs. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 12. As Sprint's own economist and Staff's policy witness admitted, consumers would be better off if the Pronto DSL facilities are deployed in Illinois than if they are not. Rhg. Tr. 1789-91 (Staihr); Rhg. Tr. 1985 (Clausen).

Moreover, Ameritech Illinois is required to allow CLECs to use the Pronto DSL architecture to provide competitive high-speed data services through the proposed Broadband Service offering. If Pronto DSL facilities are deployed, Ameritech Illinois will offer CLECs an end-to-end Broadband Service that CLECs can purchase at TELRIC-based prices and customize to differentiate their services. *Project Pronto Order*, ¶¶ 23, 42, 48. Ameritech Illinois has offered in this proceeding to extend the availability of the Broadband Service for a year beyond the time required in the FCC's *Project Pronto Order* in order to address any CLEC or Commission concerns about how long the service would be provided. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 32-33; Rhg. Tr. 360-61 (Ireland). Ameritech Illinois' concern is that the Order currently imposes sharing requirements on the Pronto DSL architecture that go well beyond the Broadband Service and the many other requirements of the *Project Pronto Order*. These sharing requirements eliminate both the economic and technical feasibility of deploying the Pronto DSL facilities and tilt the advanced services playing field even more in favor of non-DSL technologies.

3. The Commission granted rehearing to gather more evidence on the relevant policy, economic, and technical matters, and the rehearing process has been very beneficial in clarifying the facts and issues. For example, while the Order would require "collocation" of *any* kind of NGDLC line card in Project Pronto equipment, Alcatel's Chief Technical Officer testified that such "collocation" of other manufacturer's line cards was technically infeasible (Am. Ill. Rhg. Ex. 3.0 (Ransom) at 3-4). Faced with that testimony, and in contrast to their prior representations and the broad "collocation" language of the Order, the CLECs now state that they have no intent or desire to "collocate" any line cards that are not manufactured or licensed by Alcatel as fully compatible with the specific NGDLC equipment that would be deployed by Ameritech Illinois.[15]

Similarly, in what can only be characterized as a "moving target" approach, the CLECs' testimony now suggests (but does not specifically commit) that what they really want is not "unbundling" of any of the individual pieces of the Project Pronto DSL network, but rather end-to-end "platform" access to that DSL architecture and the ability to differentiate their services through such access. Sprint Rhg. Ex. 5.0 (Dunbar) at 30, 33, 41; Sprint Rhg. Ex. 3.0 (Burt) at 4. Of course, Ameritech Illinois already has offered to provide such end-to-end access and the ability to differentiate services through its Broadband Service, at TELRIC-based rates, without any need for "unbundling" or line card "collocation" and their attendant problems. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 13-19. Moreover, it is clear that the CLECs care little about using the Pronto DSL architecture as it is intended (*i.e.*, for the mass market of small business and residential customers), but rather want to dictate future Ameritech Illinois asset deployment decisions and

[15] Rhythms Rhg. Ex. 1.0 (Watson) at 29; Covad Rhg. Ex. 1.0 (Carter) at 25; Sprint Rhg. Ex. 3.0 (Burt) at 31; Covad Rhg. Ex. 2.0 (Gindlesberger) at 6-7; Rhg. Tr. 1941 (Carter); Rhg. Tr. 1911-12 (Gindlesberger).

re-engineer Ameritech Illinois' network investment to meet each of their individual business plans.[16]

Indeed, essentially everything the CLECs claim to want involves capabilities that do not currently exist in the equipment that Ameritech Illinois had planned to deploy, such as symmetrical speed services and higher bandwidth capability. As a policy, economic, technical, and legal matter, it is only sensible that all such requests should be considered through the collaborative and customer request processes established in the FCC's *Project Pronto Order* (App. A. at 37, 42), not as part of a speculative mandate in this case.

Significantly, the Commission Staff now recommends against "unbundling" any individual components of the Pronto DSL architecture. Rather, Staff proposes that the Commission define the Broadband Service as an end-to-end UNE. Staff Rhg. Ex. 1.0 (Clausen) at 11. While Ameritech Illinois does not agree with Staff's recommendation, still conflicts with the FCC's packet switching rule and the *Project Pronto Order*, this is the kind of big-picture analysis that is appropriate in the face of rapidly changing technology and a rapidly emerging marketplace for advanced services. Staff's position shows the progress that has been made through the more detailed examination of these Project Pronto issues on rehearing.[17]

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[16] The evidence on rehearing also shows that the motives of some CLECs in this case are highly suspect. AT&T, for example, is the dominant broadband service provider in Illinois and nationwide through its cable modem service. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 12, 14-15. Its only incentive here can be to inhibit competition – and it obviously thinks the best way to do that is stop deployment of Pronto DSL facilities. (Notably, AT&T's witness had absolutely no idea how AT&T would ever use the Pronto DSL architecture if it were "unbundled." Rhg. Tr. 1896 (Starkey).) Sprint already provides wireless broadband service, so it has the same incentives as AT&T. Sprint also admits that the wireline DSL service it would like to provide requires virtual bit rate ("VBR") capability (Rhg. Tr. 1236 (Dunbar)), but the Pronto DSL equipment has no VBR capability and the manufacturer has no firm plans to include such capability. Am. Ill. Rhg. Ex. 10.1 (Keown) at 12; Rhg. Tr. 734 (Ransom); Rhg. Tr. 1236 (Dunbar). Thus, it is unclear what real business interest Sprint would have in "unbundling" Pronto DSL facilities.

[17] It is worth noting that no other state has imposed burdens on advanced services deployment as onerous as those in the Order. Michigan refused to require unbundling of Project Pronto at all in Case U-12540 and recently denied the CLECs' request for rehearing on the issue. Connecticut found that existing HFPL offerings and the Broadband service were sufficient reason not to require "line sharing" over Project Pronto, a decision just finalized on June 13. New York gave Verizon a choice between unbundling DSL facilities and offering something like the Broadband

The CLECs nevertheless attempt to preserve the Order's current "unbundling" and "collocation" requirements by arguing that they would have no adverse impact on the technical, economic, or operational viability of Project Pronto DSL deployment. In a nutshell, the CLECs spend most of their time arguing red herrings or creating straw men, claiming, for example, that Ameritech Illinois will deploy Project Pronto DSL facilities no matter what,[18] that the requirements that the Order imposes pose no economic, technical, or operational difficulties, and that in the end Ameritech Illinois would be made whole through TELRIC-based pricing. These assertions not only ignore the facts, they completely disregard the "big picture"; that is, the rapidly changing and highly competitive advanced services market in which Ameritech Illinois' planned Pronto DSL deployment would have to compete.

The fact is that SBC and Ameritech Illinois have analyzed the risks and costs that the Order's requirements could impose, including the problems of making such a large infrastructure investment and then losing control over the risks and cost structure associated with that investment.[19] The technical difficulties are obvious. Even the CLECs concede that many of these problems would exist but try to talk around them by speculating about possible future solutions; in other words, they want regulation by speculation. The CLECs also claim that TELRIC-based rates would make up for all the new costs and risks, but that claim is patently unrealistic. Putting aside the issue of whether TELRIC-based rates are compensatory – which

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Service. Pennsylvania declined to require unbundling or line card collocation. All of these decisions are discussed in Am. Ill. Rhg. Ex. 2.0 (Crandall) at 16-18. Most recently, a Texas arbitration panel declined to require any individual Project Pronto UNEs or line card collocation. Arbitration Award, Dockets 22168 and 22649 (Pub. Utils. Comm'n of Texas, July 12, 2001) ("*Texas Arbitration Award*"). That decision is not yet final.

[18] One CLEC argument on this point is that recent amendments to the PUA require Ameritech Illinois to deploy DSL facilities. Covad Rhg. Ex. 1.0 (Carter) at 7. That is incorrect. The recently added Section 13-517 requires Ameritech Illinois to make advanced services capability available, but does not mention Project Pronto, DSL, or any particular broadband technology. Rhg. Tr. 475-77 (Ireland).

[19] Am. Ill. Rhg. Ex. 1.0 (Ireland) at 3, 23-24; Am. Ill. Rhg. Ex. 1.1 (Ireland) at 2-4; Am. Ill. Rhg. Ex. 8.0 (Aron) at 29-42.

Ameritech Illinois believes they are not and which the Supreme Court will soon address – the CLECs' position ignores the immutable fact that, in the competitive advanced services market, it is the market's pricing forces, and not any regulator-imposed pricing methodology, that will ultimately determine whether a service supplier recovers its costs. As with the *Project Pronto Order* proceeding, where CLECs demanded conditions, got them, and then never took advantage of them, there is a real risk that Ameritech Illinois would invest millions of dollars to comply with the Order's current requirements, only to find no substantial CLEC demand for the offerings. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 22-23; Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3. It does not matter how rates are set if no CLEC buys the product.

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In sum, the advanced services market, including all the different technological mediums and types of providers, is new and rapidly changing. Entering and competing in that market requires new investment and new equipment for *any* provider. Ameritech Illinois was prepared to make a significant investment in such equipment (and incur the known risks), to make the new architecture available to all carriers on a nondiscriminatory basis, subject to the conditions of the *Project Pronto Order*, but the Order as it stands would wrest control of the Project Pronto investment and cost structure away from Ameritech Illinois and require dramatic operational and technical changes. Given the multiple commitments in the *Project Pronto Order*, the nascent state of the advanced services market, the adverse effect on consumers and competition if the Order remains as is, and the fact that the FCC has already determined when packet switching can and cannot be unbundled, Ameritech Illinois respectfully requests that the Commission modify its Order by removing all "unbundling" and "collocation" requirements related to Project Pronto.

Ameritech Illinois also requests that the Commission revise its decisions on the other issues on which rehearing was granted, for the reasons stated herein.

ARGUMENT

The Commission granted rehearing on issues 2, 3, 6, 8, 9, 13, and 14, with those numbers corresponding to the roman numeral sections in Ameritech Illinois' Application for Rehearing. All of these issues are addressed below.[20]

First, however, we briefly respond to Staff's compromise proposal. Although the CLECs have apparently backed away from (but not withdrawn) some of their most extreme and infeasible demands adopted in the Order, only the Staff has attempted to reach middle ground in response to Ameritech Illinois' evidentiary showing. Staff witness Clausen recommends "ordering Ameritech to tariff a complete ADSL capable UNE platform, traversing from the CO to the end user premises, using the Project Pronto architecture." Staff Rhg. Ex. 1.0 (Clausen) at 11. Mr. Clausen explained that this "NGDLC UNE platform" would "consist of SBC's current broadband service" and that offering such a platform "would be a superior alternative to the line card collocation requirement and the offering of separate network elements." *Id.* at 11-13. As to the future developments, he recommends that Ameritech Illinois be "required to tariff" a new version of the NGDLC UNE platform "*as soon as* either Alcatel or a licensed manufacturer issues a new line card," and be required to offer a modified platform as soon as Alcatel

[20] Ameritech Illinois will not repeat its arguments on issues 1, 4, 5, 7, 10, 11, 12, and 15 from its Application on Rehearing, but it continues to believe that such arguments are valid and require modification of the Order. Accordingly, Ameritech Illinois incorporates all of those arguments by reference into this Brief on Rehearing (*see* Ameritech Illinois' Application for Rehearing, pages 17-23, 56-58, 70-80, 111-114, and 116-117). Pages 17-23 discuss Section 706 of the 1996 Act and why the Order conflicts with and is preempted by that Section and the FCC's national broadband policy. Pages 56-58 discuss why the Order should be modified in light of the requirements of Sections 261(c) and 253 of the 1996 Act. Pages 70-80 discuss structural preemption principles and why federal law preempts the Order's use of state tariff proceedings to impose new and additional unbundling requirements that go beyond Ameritech Illinois' interconnection agreements or voluntary HFPL UNE tariff. Pages 111-14 discuss the unlawfulness of a requirement to provide splitters a shelf at a time, of a requirement to give DSL CLECs preferential provisioning intervals, and of a requirement to compute loop conditioning charges in the manner proposed by Staff. Pages 115-16 explain why the Commission's rejection of Ameritech Illinois' liability, indemnification, and customer notification provision is improper.

"develops the capability to provide multiple Permanent Virtual Paths ('PVP') per channel bank." *Id*. at 13-14 (emphasis added).

Ameritech Illinois applauds Staff for taking a big-picture view of the advanced services marketplace and the issues faced by both Ameritech Illinois and CLECs. There are, however, some potentially significant problems with Staff's proposal.

First, as a legal matter, and as Ameritech Illinois has explained previously, Ameritech Illinois does not agree that the Broadband Service can be defined as a UNE or UNE platform. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 56. On the contrary, as explained in this brief, the facilities at issue provide packet switching functionality, which cannot lawfully be unbundled in Illinois under the FCC's rules. In its *UNE Remand Order*, the FCC has already performed an "impair" analysis as required by Section 251(d)(2) of the 1996 Act, and this Commission cannot deviate from the FCC's conclusion. The Broadband Service also cannot satisfy the FCC's "impair" test for unbundling as a single UNE, and neither do any of the alleged individual UNEs that would make up an "NGDLC UNE platform."[21]

Second, the proposed requirement that Ameritech Illinois modify its network "as soon as" new NGDLC line cards or other new capabilities become available poses both legal and practical problems. It poses legal problems because it would appear to require Ameritech Illinois to buy, deploy, and maintain new equipment for possible use by CLECs even in cases where it would not otherwise have deployed the equipment itself. That would directly violate the Eighth Circuit's decision striking down the FCC's "superior quality" rules and explaining that CLECs can access the ILEC's existing network only. *Iowa Utils. Bd. v. FCC*, 219 744, 757-58 (8th Cir. 2000) ("*IUB III*") *cert. granted on other issues*, 121 S. Ct. 878 (2001).

[21] Mr. Clausen's recommendation to require Ameritech Illinois to tariff the alleged NGDLC Platform UNE also is preempted by the structure of the 1996 Act. *See* Am. Ill. Appl. for Rehearing at 70-80 (incorporated by reference).

Staff's proposal also raises practical problems because the mere fact that an NGDLC vendor develops a new capability that is compatible with its NGDLCs does not mean it would be economically feasible or technically practicable for Ameritech Illinois to deploy it. New capabilities could be squarely at odds with Ameritech Illinois' intended use of the assets that it planned to deploy (and the economic assumptions underlying that planned deployment), and also could cause capacity-related or other service-affecting problems that would make deployment a bad idea. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 17; Am. Ill. Rhg. Ex. 4.1 (Boyer) at 32. The FCC recognized such potential problems in the *Project Pronto Order* (¶ 44) and consequently established collaborative and customer request processes instead of a flat-out "new facilities" or "new features" deployment mandate.

Moreover, mandating that Ameritech Illinois automatically implement any and every new NGDLC capability could cost Ameritech Illinois a substantial amount of money and resources for capabilities it would not otherwise have deployed. Because CLECs do not have to make any commitment to use any such new capability, Ameritech Illinois would be left with sunk costs it has no ability to recover. Indeed, SBC has already experienced problems with a "build it and they will come" approach. Under the *Project Pronto Order*, for example, SBC has spent hundreds of millions of dollars to build extra space for CLEC collocation in Pronto RTs (something that the CLECs insisted be made a condition of the FCC's Order) and to deploy OCDs that were not contemplated in the original Project Pronto business case. Yet the SBC ILECs have had absolutely no CLEC demand for collocation in those RTs or orders for the Broadband Service by unaffiliated CLECs. *See* Am. Ill. Rhg. Ex. 4.1 (Boyer) at 22-23; Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3.

In short, while Staff's proposal in principle represents a significant step in the right direction, the legal and practical problems with Staff's approach serve to highlight the greater reasonableness of Ameritech Illinois' proposal to provide the Broadband Service, host national collaboratives, and take other pro-competitive steps as required by the *Project Pronto Order*.

I. ISSUE 2: THE PROJECT PRONTO ARCHITECTURE CANNOT BE UNBUNDLED BECAUSE IT PROVIDES PACKET SWITCHING FUNCTIONALITY AND THE FCC'S PREREQUISITES FOR UNBUNDLING PACKET SWITCHING DO NOT EXIST.

Ameritech Illinois, Staff, and all of the CLECs (except Covad) agree that the Pronto DSL facilities (the NGDLC ATM facilities, the OCD, and associated transport) are packet switching facilities.[22] Everyone also agrees (again, except Covad), that the limited circumstances in which packet switching functionality can be unbundled are established by the FCC's Rule 319(c).[23] The FCC's decision to prohibit the imposition of a packet switching unbundling requirement, except in the limited circumstances, "reflects [its] concern that [it] not stifle burgeoning competition in the advanced services market" and its belief that "regulatory restraint on [its] part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation" in advanced services. *UNE Remand Order*, ¶ 316. FCC Rule 319(c)(5) thus establishes four conditions that *all* must exist before packet switching functionality can be required to be unbundled. Stated another way, the governing FCC Rules *prohibit* regulators from requiring ILECs to unbundle packet switching functionality in their networks unless the FCC's specific conditions are satisfied.

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[22] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 24-25; Rhythms Rhg. Ex. 1.0 (Watson) at 16; Sprint Rhg. Ex. 3.0 (Burt) at 16; Order on Rehearing, Ill. C.C. Dkt. 00-0312/0313 at 31; *Project Pronto Order*, ¶¶ 14, 18. AT&T/MCI Witness Starkey tried to claim the Pronto DSL facilities do not provide packet switching functionality, but was forced to concede that he had previously testified under oath that they do provide such functionality. Rhg. Tr. 1899-1901 (Starkey).

[23] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 25-26; Sprint Rhg. Ex. 3.0 (Burt) at 16; Rhythms Rhg. Ex. 1.0 (Watson) at 16.

The record on rehearing makes clear that the FCC's four conditions, which were not examined in the Order, do not exist in Illinois. As a legal matter, this should end the issue. Each of these four conditions is discussed below.[24]

(i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault).

A threshold issue in applying this condition, but one that can be easily disposed of, is whether it is satisfied whenever an ILEC has deployed digital loop carrier ("DLC") systems anywhere in its network, or whether the DLC system must actually be one "in which fiber facilities replace copper facilities in the distribution section." In other words, must the rule be applied on a case-by-case, DLC-specific basis? The clear answer is that it must. This is the only sensible reading and the only one that comports with the FCC's plain language.

The FCC's concern in creating was that

> [i]n locations where the incumbent has deployed digital loop carrier (DLC) systems, an uninterrupted copper loop *is replaced with a fiber segment or shared copper in the distribution section of the loop*. In this situation, and where no spare copper facilities are available, competitors are effectively precluded altogether from offering xDSL service if they do not have access to unbundled packet switching.

UNE Remand Order, ¶ 313 (emphasis added). The FCC's focus was on situations where an ILEC had both *actually* "replaced" copper distribution facilities with fiber *and* no spare copper

[24] The CLECs may argue that market conditions have changed since the *UNE Remand Order* and that the Commission can therefore ignore the FCC's rule. State commissions, however, are not free to disregard the FCC's rules based on alleged changes in market conditions; if they could, neither ILECs nor CLECs would ever have any certainty about the scope of unbundling requirements. Under the Hobbs Act, a single federal court of appeals has exclusive jurisdiction to review the FCC's Orders, (28 U.S.C. 2342) and both direct and indirect challenges to the FCC's conclusions are impermissible in any other forum. *See, e.g., FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996). Any argument based on supposedly "changed market conditions" would constitute a collateral attack on the *UNE Remand Order*, and thus would be barred by the Hobbs Act. In any event, the FCC also has already taken steps to address changing conditions by reviewing its unbundling rules on a regular basis. *UNE Remand Order*, ¶ 151. Thus, it is the FCC alone that can modify its specific unbundling requirements based on changed conditions.

facilities were available, and thereby foreclosed the CLEC from offering xDSL service in that area. If, however, the ILEC merely deploys DLC facilities *without* "replac[ing]" existing copper distribution facilities, no such problem exists. Accordingly, the only possible reading of Rule 319(c)(5)(i) in light of the *UNE Remand Order* is that it is satisfied only in cases where a DLC or other system is actually used to "replace copper facilities in the distribution section" of the loop. The NGDLC facilities that Ameritech Illinois would deploy as part of Project Pronto would not "replace copper facilities in the distribution section" of the loop. Project Pronto involves purely overlay facilities that do not "replace" or displace *any* of the existing copper distribution facilities. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 26; Am. Ill. Ex. 6.1 (Lube) at 13-14, 16.

The CLECs nevertheless claim that this first condition has been satisfied in either of two ways. They first assert that it is met whenever an ILEC deploys a DLC system anywhere in its network. Rhythms Rhg. Ex. 1.0 (Watson) at 15; Sprint Rhg. Ex. 30 (Burt) at 16-17. That reading ignores the plain language of the FCC's Rule and the FCC's stated reasons for the condition. Moreover, because virtually all ILECs have some DLC systems in their network, the CLECs' reading would render the FCC's rule a nullity, as it would be automatically satisfied everywhere. The CLECs' reading also would lead to absurd results, as it would mean that Ameritech Illinois would have to unbundle packet switching in Springfield merely because it had a DLC system in Evanston. That cannot be right.

The CLECs' other argument is that Project Pronto DSL facilities are not an overlay, but rather a mere upgrade of the network. *E.g.*, Rhythms Rhg. Ex. 1.0 (Watson) at 5-7. This semantic distinction is meaningless. No matter whether one calls it an overlay or an upgrade, the fiber facilities that would be installed as part of the planned Project Pronto DSL deployment would not replace the existing copper. In fact, Ameritech Illinois has specific requirements

under the *Project Pronto Order* to maintain existing copper facilities. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 26; *Project Pronto Order*, App. A at 41.

(ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer.

Like the first FCC condition, a determination of whether this condition exists can only be made on a case-by-case (that is, an RT-by-RT) basis. In creating this condition, the FCC was interested in a specific "limited situation" where "no spare copper facilities are available," as it is only in that specific case that a CLEC's ability to provide broadband service to small business and residential customers might be impaired. *UNE Remand Order*, ¶ 313. Because Project Pronto DSL equipment is an overlay, any spare copper loops that existed before Pronto DSL deployment would still be available after deployment. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 26-27; Am. Ill. Rhg. Ex. 4.1 (Boyer) at 26-27. The question whether there are "spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer" therefore is independent of Project Pronto DSL deployment and can only be answered on a location-specific basis. To read the FCC's rule as requiring unbundling if there is *any place* in the ILEC's network where no spare copper loops are available, or, even worse, as requiring unbundling if there is a mere *possibility* that spare copper loops will not always be available somewhere in Ameritech Illinois' network, would contradict the plain language of the FCC's rule and deprive it of any substance.

The CLECs contend that, where Project Pronto NGDLCs are deployed, the spare copper loops in that area would always be unusable for DSL service. Rhythms Rhg. Ex. 1.0 (Watson) at 15-16. Their theory seems to be that Pronto DSL facilities will be deployed in areas where existing copper loops are typically too long for DSL service, meaning that after the Pronto DSL equipment is deployed the only remaining copper loops would not be useful for DSL. This

contention ignores the ability of CLECs to access copper loops through DSLAM collocation at an RT or elsewhere. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 27. Such collocation would allow CLECs to access a copper facility that is short enough for DSL services. Project Pronto would actually facilitate access to such copper facilities by creating an opportunity for CLECs to access those copper facilities closer to the end user premises (through an Engineering Controlled Splice ("ECS") arrangement) and then use either the CLEC's own facilities or leased transport to carry traffic back to the central office. *Ibid*. This is one of the ways in which Pronto DSL deployment would increase CLEC options rather than limit them.

Some CLECs have also alleged that "cross talk" or spectral interference problems will prevent them from providing DSL services where Pronto NGDLCs are deployed. *E.g.*, Rhythms Rhg. Ex. 1.0 (Watson) at 16; Covad Rhg. Ex. 2.0 (Gindlesberger) at 17. The theory is that RT-based DSL service and central office-based DSL service will interfere with one another, making the CLEC's CO-based DSL service lose its quality. That theory has no evidence to support it. An industry group is looking into the issue and one manufacturer has run a computer simulation, but the only empirical evidence on the issue has come from SBC. Am. Ill. Rhg. Ex. 10.1 (Keown) at 12. SBC, which has the same interest as the CLECs in maintaining the quality of service on the network, has observed the co-existence of RT-based and CO-based DSL in the field and has not observed any "cross talk" problems. *Ibid*. Moreover, SBC's research arm, TRI, has developed, and SBC's ILECs have implemented, a measure that will remove any potential cross-talk problems. *See* Rhg. Tr. 2007-08; Am. Ill. Keown Direct Rhg. Ex. 1.

(iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this Section.

The third condition also asks an RT-by-RT question of whether the ILEC has actually denied a CLEC request to deploy a DSLAM in a particular remote terminal or similar location or to virtually collocate a DSLAM in that location. Ameritech Illinois has never denied a request by a CLEC to collocate a DSLAM at or in an RT or similar location in Illinois; in fact, no CLEC has even requested such collocation in Illinois. Am. Ill. Rhg. Ex. 6.0 (Welch) at 12; Am. Ill. Rhg. Ex. 6.1 (Welch) at 2; Rhg. Tr. 1801-02 (Staihr); Rhg. Tr. 1935 (Carter); Rhg. Tr. 1907 (Gindlesberger). Moreover, it is undisputed that Ameritech Illinois allows collocation of DSLAMs at its existing RTs and has committed to allow such collocation in future RTs. Am. Ill. Ex. 6.1 (Lube) at 16. Ameritech Illinois is required to offer such collocation and to create space or build extra space in RTs specifically to accommodate such collocation. Am. Ill. Rhg. Ex. 6.1 (Welch) at 2-5; *Project Pronto Order*, ¶¶ 34, 35, 61 and App. A at 38-40. No one but SBC's ILECs faces those kinds of requirements.

Even on rehearing, the CLECs make no claim that they have been denied DSLAM collocation at any Ameritech Illinois RT. Instead, they attempt to shift the debate (and rewrite the FCC's rules) in four ways. *First*, they claim that an ADLU card in the NGDLC *is* a DSLAM and that, by not allowing "collocation" of ADLU cards within Channel Bank Assembly slots in the RTs, Ameritech Illinois has somehow "denied" CLEC requests for DSLAM collocation.[25] That claim is baseless. An ADLU card is not a DSLAM and cannot be equated to a DSLAM. Simply put, it does not perform all the functions that define a DSLAM. The FCC made clear that a DSLAM performs at least four functions:

> (1) the ability to terminate copper customer loops (which includes both a low-band voice channel and a high-band data channel, or solely a data channel);

[25] Sprint Rhg. Ex. 3.0 (Burt) at 18; Rhythms Rhg. Ex. 1.0 (Watson) at 16; Covad Rhg. Ex. 1.0 (Carter) at 14.

(2) the ability to forward the voice channels, if present, to a circuit switch or multiple circuit switches;

(3) the ability to extract data units from the data channels on the loops; and

(4) the ability to combine data units from multiple loops onto one or more trunks that connect to a packet switch or packet switches.

UNE Remand Order, ¶ 303.

An ADLU line card performs only the first two of those functions, as the CLECs have conceded.[26] The third and fourth functions, packetizing and multiplexing, are performed by the NGDLC system software and other NGDLC hardware components, including the ATM Bank Control Units (ABCUs) in those NGDLCs.[27] An ADLU line card cannot be equated to a DSLAM simply because it performs *a part* of a DSLAM's functionalities. Rather, the only equivalent to a DSLAM in the Pronto architecture is the NGDLC DSL system as a whole.[28] Am. Ill. Rhg. Ex. 4.1 (Boyer) at 29. CLECs can collocate their own DSLAMs or NGDLCs in Ameritech Illinois' RTs upon request, and can do so on the exact same terms and conditions as Ameritech Illinois' advanced services affiliate.[29]

The CLECs' argument also is logically absurd. The FCC's rule says that packet switching can be unbundled if certain conditions are met, including an ILEC's refusal to permit DSLAM collocation. In other words, unbundled packet switching would be available only as a

[26] Am. Ill. Rhg. Ex. 4.1 (Boyer) at 29; Rhg. Tr. 1253-54 (Dunbar); Rhg. Tr. 1429-30, 1444-45 (Watson).

[27] Rhg. Tr. 1253-54 (Dunbar); Rhg. Tr. 1429-30 (Watson); Am. Ill. Rhg. Ex. 4.1 (Boyer) at 29.

[28] The CLECs themselves cannot even agree on whether an ADLU card should be treated as if it were a DSLAM. Some CLECs argue that an ADLU card should be deemed part of the local loop UNE. Covad Rhg. Ex. 1.0 (Carter) at 8; AT&T/WorldCom Rhg. Ex. 1.0 (Starkey) at 6. By definition, however, a DSLAM *cannot* be part of the local loop UNE (47 C.F.R. 51.319(a)(1)), meaning that, under these CLECs' theory, an ADLU card could never be a DSLAM.

[29] In addition, as explained later in this brief, ADLU cards cannot legally qualify for collocation. Thus, even if they could be treated as if they were a DSLAM for purposes of the packet switching rule (which they cannot), the inability to "collocate" such cards would not be proper or satisfy the packet switching condition.

substitute for DSLAM collocation. But under the CLECs' theory that an ADLU card is a DSLAM, "collocation" of that "DSLAM" would automatically give the CLEC unbundled packet switching as well. The FCC's rule does not allow CLECs to have their cake and eat it too, which defeats their position.

Second, the CLECs claim the third condition is satisfied because DSLAM collocation allegedly is too expensive. *E.g.*, Sprint Rhg. Ex. 3.0 (Burt) at 19. That assertion is entirely inopposite, because the FCC's packet switching rule does not contemplate or allow consideration of the economic feasibility of DSLAM collocation at an RT. The rule expressly turns on whether "[t]he incumbent LEC has not permitted" a CLEC to collocate a DSLAM, not whether the CLEC unilaterally views such an arrangement as economically feasible. The Supreme Court and D.C. Circuit have made clear that purely economic claims by CLECs cannot determine whether something must be unbundled or allowed to be collocated. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*IUB II*"); *GTE Service Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) (noting that "the Supreme Court flatly rejected" the concept that CLECs must be allowed to collocate any equipment simply because it allegedly "lowers costs and increases the services they can offer their customers"). Likewise, the FCC already accounted for DSLAM collocation costs in developing its packet switching rule. *UNE Remand Order*, ¶ 309. The CLECs' unproven claims of economic infeasibility are therefore irrelevant.

Moreover, the CLECs' claims of economic infeasibility for DSLAM collocation at RTs are hollow. Sprint was the primary CLEC complaining about the cost of DSLAM collocation at RTs. Sprint Rhg. Ex. 3.0 (Burt) at 19, 23-24. However, Sprint's own internal documents – produced at a conference held during the hearings in this case – demonstrate that Sprint has featured DSLAM collocation at ILEC RTs as a key part of its business plans and will use it to

compete in the advanced services market. Rhg. Tr. 1863 (Burt Cross Ex. 3). The Sprint document, entitled "Remote Access Solutions," states that some "issues exist" with regard to DSLAM collocation [at RT sites], "*but can be resolved.*" Rhg. Tr. 1864 (Burt) (emphasis added). Sprint's own economist also admitted that DSLAM collocation *is* economically feasible in certain RTs. Rhg. Tr. 1804 (Staihr). Moreover, the most likely locations for CLEC collocation of DSLAMs at RTs would be at RTs metropolitan areas, where more customers can be reached. Those are precisely the areas where the CLECs have conceded they would like to collocate to reach the medium-to-large business market. *See* Rhg. Tr. 1431-32 (Watson).

Sprint's one example of a DSLAM collocation request at an RT site in Kansas not only is irrelevant to Illinois, but also represents an extreme situation where Sprint sought to collocate oversized equipment that raised safety issues. Am. Ill. Rhg. Ex. 6.1 (Welch) at 4-5. Most importantly, Sprint went ahead with the placement and installation of its DSLAM facilities at a site adjacent to the ILEC RT site, which demonstrates that Sprint must believe such deployment is economically feasible. Moreover, Sprint's witness admitted that smaller and less expensive DSLAMs exist and that many of the costs in the Kansas example would not occur at other RTs. Rhg. Tr. 1847 (Burt). And as Dr. Aron showed in her rebuttal testimony, even if one assumed Sprint's worst-case scenario for the costs of DSLAM collocation at an RT, the long-term investment would still make economic sense, as the ultimate investment per potential customer would still be below that incurred by cable modem broadband service providers. Am. Ill. Rhg. Ex. 8.1 (Aron) at 11-14. In any event, Sprint's alleged costs for DSLAM collocation at RTs are significantly overstated to begin with, as Mr. Boyer explained. Rhg. Tr. 1212-13.

Third, some CLECs assert that the alleged lack of available space for DSLAM collocation at certain unspecified RTs, or the time it allegedly would take to complete such

collocation, are enough to satisfy this part of the FCC's rule. Those assertions are again irrelevant. The FCC's rule establishes an objective standard requiring the actual denial of a CLEC collocation request by an ILEC, not a subjective standard that asks whether there are other factors that might deter the CLEC from asking for collocation at a particular RT site. The FCC knew that DSLAM collocation at RTs could in some cases run into space and delay problems but did not view that as a reason to change its rule. *UNE Remand Order*, ¶ 309. In other words, the FCC specifically considered the space and timeliness issues as part of its impair analysis, and then promulgated the specific packet switching rule that controls here and that does not list those as consideration.

In any event, the FCC's conditions in the *Project Pronto Order* (App. A at 38-39) responded to these very same CLEC "RT collocation" concerns with conditions that require SBC's ILECs to provide or create adequate space at their RTs for DSLAM collocation by CLECs. SBC ILECs have been investing substantial capital to comply with that condition. To date, however, no CLEC has taken advantage of SBC's capital outlay, providing yet another example of how unnecessary regulatory requirements shift the business risk and cost to the ILEC for no competitive or consumer benefit. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 22-23.

Fourth, the CLECs appear to argue that Ameritech Illinois would "constructively" deny DSLAM collocation at Project Pronto RTs because the hard-wired NGDLC architecture somehow makes it economically infeasible to access copper "subloops" within the RT itself. Covad Rhg. Ex. 1.0 (Carter) at 13-14. This theory again ignores the FCC's requirement that an ILEC affirmatively deny an actual CLEC RT collocation request, not that the CLEC simply choose for its own reasons not to collocate. This "economic infeasibility" theory also is improper for the reasons just stated above. Moreover, the FCC's unbundling rules make clear

that subloops only exist and can be unbundled at accessible terminals, which generally do not exist in Pronto DSL RTs. In fact, the FCC already has considered the issue of accessing copper *facilities* at an SBC ILEC's Pronto RTs in the *Project Pronto Order*. The FCC concluded that SBC ILECs need only be required to construct an ECS upon request, which enables a CLEC to access copper facilities at the RT from its collocated DSLAM. *Project Pronto Order*, App. A at 39-40. The ECS allows the CLEC to pick the exact number of copper pairs it wants to access, or to access a pair at a time, and thus to size its investment to expected demand. Am. Ill. Rhg. Ex. 6.0 (Welch) at 10. As evidenced by the FCC's adoption of the ECS arrangement, Covad's theory is baseless. As the FCC explained in the *Project Pronto Order* (¶ 28):

> Our approval of SBC's request subject to its pro-competitive commitments ... paves the way for Rhythms and other carriers to compete for those customers [who would not be able to receive DSL service without Project Pronto]. SBC's commitments will facilitate Rhythms' access to remote terminals and enable Rhythms and others to differentiate their product offerings from those of SBC's Advanced Services Affiliate.

(iv) The incumbent LEC has deployed packet switching capability for its own use.

This condition asks the case-by-case question whether the ILEC has deployed packet switching capability "for its own use" at a particular RT. This condition also has not been met. Project Pronto DSL facilities would be used by CLECs and by Ameritech Illinois' separate affiliate, AADS, in providing xDSL services. Ameritech Illinois would not use the Project Pronto DSL facilities for any retail services that it provides, and thus would not be deploying packet switching "for its own use." Am. Ill. Rhg. Ex. 4.0 (Boyer) at 30.

Commissioner Squires raises the question whether the phrase "its own use" applies to the ILEC and any affiliates together, or just the ILEC alone. The plain language of the FCC's rule refers only to "[t]he incumbent LEC" and is unambiguous. "Incumbent LEC" is a defined term under the 1996 Act and the definition does not automatically include affiliates. 47 U.S.C.

251(h). This plain reading also is consistent with the FCC's intent. The FCC was concerned that incumbent LECs themselves might be able to use packet switching capability to compete directly with CLECs and – *if* all three of the other packet switching conditions also existed at a location – possibly gain a competitive advantage. In this case, by contrast, the Pronto DSL equipment would, through Ameritech Illinois' Broadband Service, be equally available to all carriers on nondiscriminatory terms and conditions.[30]

* * *

Given these facts, the four prerequisites for requiring unbundling of packet switching do not exist. Thus, there is no legal basis on which to require "unbundling" of the Project Pronto packet switching architecture.

II. THE FCC'S IMPAIR TEST CANNOT BE INDEPENDENTLY APPLIED HERE, BUT EVEN IF IT COULD IT HAS NOT BEEN MET.

The CLECs spend much time arguing that the FCC's impair test somehow has been met, but in so doing overlook the determinative threshold legal issue: The impair test cannot be independently applied by a state regulator to the Project Pronto DSL facilities, because they provide packet switching functionality. The FCC has *already* applied the impair test to packet switching and determined the limited circumstances in which packet switching can be unbundled, which circumstances do not exist here. That ends the analysis: The Supreme Court has held that with respect to matters addressed by the 1996 Act, it is the FCC and the federal courts that draw the lines to which state commissions must hew. *IUB II*, 525 U.S. at 378 n.6. The FCC has drawn the lines with respect to packet switching functionality, and no state

[30] The FCC's *Project Pronto Order* conditions are in no way affected by the D.C. Circuit's decision in *ASCENT v. FCC*, 235 F.3d 290 (D.C. Cir. 2001) at this time, because the SBC advanced services affiliates, not the ILECs, continue to provide retail advanced services. In other words, SBC has not exercised its conditional right under the FCC's merger conditions to merge its advanced services affiliates with its ILECs, and it may never exercise that conditional right.

commission has the authority to erase and redraw them for itself. *Ibid.* Under federal preemption principles and the Supremacy Clause, the state commission must yield to federal statutory and regulatory commands. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 775-76 (1947) (When state and federal regulators "have laid hold of the same relationship for regulation," the states must give way in the event of a conflict between the dualing regulatory schemes.). Federal regulations enacted by an administrative agency empowered by Congress to act on its behalf have "no less preemptive effect" than direct statutory commands from Congress. *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). As a threshold matter, then, any state commission order that, like the Order at issue here, purports to order the unbundling of the Project Pronto DSL packet switching facilities other than under Rule 391(c)(5) is unlawful and must be vacated, so the impair test is irrelevant.[31]

There also is no need to go through an independent impair analysis, even if the Commission legally could do so (which it cannot), for this reason: The FCC has found that CLECs are not impaired in their ability to provide advanced services today, so it is logically

[31] The CLECs argue that the Commission could order such unbundling pursuant to state-law authority, independent of any federal law. *E.g.*, Covad Rhg. Ex. 1.0 (Carter) at 36. That argument, however, ignores the genesis of the FCC's rule on packet switching and the preemptive force of the 1996 Act with respect to unbundling requirements. This is not a case where the FCC was silent or left a gap for state commissions to fill. To the contrary, the FCC specifically applied the necessary and impair tests to packet switching functionality and reached a definitive conclusion on those tests, *i.e.*, that packet switching functionality meets the standard for unbundling under the 1996 Act if and only if all four conditions in Rule 319(c)(5) exist. More fundamentally, the CLEC argument ignores the Supremacy Clause of the U.S. Constitution and the Supreme Court's statement that with regard to matters addressed by the 1996 Act – such as the rules for deciding when a network element has to be unbundled – the federal government "unquestionably" has taken authority away from the states, meaning any state-imposed requirement *must* abide by the standards in the 1996 Act and the FCC's rules. *IUB II*, 525 U.S. at 378 n.6.

In any event, assuming that promulgating unbundling rules for packet switching were within the scope of state regulatory authority under the Act's savings clauses, none of those clauses would authorize the Commission to require "unbundling" of the Project Pronto packet switching architecture. Each of the Act's savings clauses unequivocally permits state regulation only to the extent that it is not inconsistent with the Act and its implementing regulations. See 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b), 261(c); see also Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (uncodified savings clause). As explained above, the requirement that Ameritech "unbundled" packet switching functionality clashes directly with the Act and the FCC's rules.

impossible for them to be impaired if new Pronto DSL facilities are deployed and they gain *more* options to provide such services to *more* customers.[32]

Other CLECs argue that the Pronto DSL facilities are all part of a standard local loop that the FCC already requires to be unbundled. AT&T/WorldCom Rhg. Ex. 1.0 (Starkey) at 3, 6; Covad Rhg. Ex. 1.0 (Carter) at 36. That argument is flat wrong and directly conflicts with the plain language of FCC's rules. It is undisputed that the Pronto DSL facilities (such as the NGDLC DSL facilities and the OCD) provide an advanced services packet switching functionality.[33] The FCC's rule explicitly *excludes* from the definition of an unbundled local loop any "attached electronics" that are "used for the provision of advanced services." 47 C.F.R. 51.319(a)(1). The NGDLC DSL facilities and OCD are such "attached electronics." *See* Rhg. Tr. 1253-54 (Dunbar); Rhg. Tr. 1429-30,1444-45 (Watson); *Project Pronto Order*, ¶¶ 14, 18. Thus, the definition of a loop does not and cannot encompass the Pronto DSL facilities that the CLECs seek to have "unbundled." To do so would improperly mix and match the loop and packet switching network elements, nullifying the FCC's distinct rules for each. The FCC made this clear in a recent letter to Congressman Tauzin, stating that "[a]n ILEC however, is not required to unbundle packet switching capability that may be associated with a subloop unless the Commission's four-part test for packet switching capability unbundling is met."[34]

Sprint argues that the impair test is somehow satisfied because the FCC already applied that test to the HFPL UNE. Sprint Rhg. Ex. 3.0 (Burt) at 22-23. Ameritech Illinois agrees that

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[32] Mr. Boyer explained the competitive options CLECs already have for providing xDSL Service without Project Pronto: collocating a DSLAM at a central office and leasing copper subloops and transport provided by the ILEC, the CLEC, or a third party. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 13, 28.

[33] Rhg. Tr. 1899-1901 (Starkey); Sprint Rhg. Ex. 3.0 (Burt) at 16; Rhythms Rhg. Ex. 1.0 (Watson) at 16; *Project Pronto Order*, ¶¶ 14, 18.

[34] Letter from John A. Rogovin, FCC Deputy General Counsel, to the Hon. W. J. Tauzin, dated July 26, 2001, at 3 (Attachment B. hereto).

where the FCC has already applied the impair test state commissions cannot retread the same ground, but Sprint's argument is wholly inapposite. This case does not involving unbundling the HFPL; Ameritech Illinois already provides the HFPL as a UNE. This case involves the proposed unbundling of packet switching functionality, and the FCC has made clear that nothing in the *Line Sharing Order* or *Line Sharing Reconsideration Order* alters its packet switching rule.[35]

Putting aside for the moment the Commission's lack of authority to independently apply the FCC's impair test to packet switching, if the Commission nevertheless were to engage in such an analysis, the first step would be to define the scope of the inquiry under the impair test. The ultimate question is whether lack of unbundled access to a network element would "materially diminish[] a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. 51.317(b)(1). To determine whether impairment exists, the agency must consider "the totality of the circumstances." *Ibid*. The burden of proof of impairment lies with the CLEC, which is the party seeking a change from the status quo. If the agency finds that impairment exists, it "may" require unbundling of a network element, "subject to any consideration of the factors set forth under section 51.317(c)." *Ibid*. In other words, if the agency finds impairment under Rule 317(b)(1), it may then consider whether the factors in Rule 317(b)(3) nevertheless counsel against imposing an unbundling requirement in light of the goals of the 1996 Act. *UNE Remand Order*, ¶ 106.

A. THE FACTORS UNDER RULE 317(B)(2) DO NOT SUPPORT A FINDING OF IMPAIRMENT IN LIGHT OF THE AVAILABLE ALTERNATIVES TO

[35] Order Clarification, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, DA 01-480 (rel. Feb. 23, 2001):

> In this Order, we clarify that the *Line Sharing Reconsideration Order* in no way modified the criteria set forth in the Commission's *UNE Remand Order* regarding the unbundling of packet switching functionality. Specifically, we clarify that the *Line Sharing Reconsideration Order* does not alter section 51.319(b)(5) of the Commission's rules, which describes the limited set of circumstances under which an incumbent LEC is required to provide nondiscriminatory access to unbundled packet switching capability.

"UNBUNDLING" AMERITECH ILLINOIS' PLANNED PRONTO DSL FACILITIES

The analysis under subsection (b)(2) examines whether "alternative[s] to the incumbent LEC's network element" are "available in such a manner that a requesting carrier can provide service using the alternative." 47 C.F.R. 51.317(b)(1). The primary alternatives to "unbundling" Project Pronto DSL facilities that would enable CLECs to offer their desired services are:

1. The Broadband Service.
2. Use of unbundled copper subloops or copper loops (or the HFPL of those copper subloops or copper loops) loops with the CLEC's own equipment, including a collocated DSLAM at the central office or remote terminal.
3. Self provisioning of facilities or buying or leasing them from a third party provider.
4. Use of non-DSL advanced services technologies such as wireless and satellite.

Am. Ill. Rhg. Ex. 4.0 (Boyer) at 50.

In an attempt to convince the Commission not to consider the Broadband Service, the CLECs assert that the only "alternatives" to be considered are those "outside the incumbent LEC's network," *E.g.*, AT&T/WorldCom Rhg. Ex. 1.0 (Starkey) at 16. That position is inconsistent with both the 1996 Act and common sense. The Supreme Court held that the FCC's original interpretation of the impair test was flawed because it looked only to the ILEC's network and did not consider alternatives outside that network. *IUB II*, 525 U.S. at 392. But that does not mean those "outside" alternatives are now the *only* ones that can be considered. A refusal to consider any alternatives inside the ILEC's network would be just as overly narrow, and just as impermissible, as the FCC's original refusal to consider alternatives outside the ILEC's network. The impair test thus requires consideration of *all* alternatives to the proposed UNE, including the Broadband Service.

Moreover, the CLECs immediately contradict themselves by arguing that the impair analysis cannot consider alternative technologies for broadband services, such as cable modems

or satellite or wireless, even though such technologies are obviously "outside the incumbent LEC's network." The CLECs apparently think these alternatives are *too far* outside the incumbent LEC's network. But once again, the Supreme Court did not announce any cut-off on what alternatives must be considered, either inside or outside the ILEC's network, and any true inquiry into alternatives outside the ILEC's network must at least look at all the competing ways of providing functionally similar services to consumers. Thus, these alternative technologies for delivering advanced services should factor into the Commission's analysis.[36] And even if these competing technologies did not fall under the FCC's Rule 317(b)(2) factors, they are clearly relevant to – indeed, probative of – the application of the FCC's Rule 317(b)(3) factors, which give substance to the fundamental goals and objectives of the 1996 Act.

The CLECs also argue that the Commission cannot consider the Broadband Service as an alternative to "unbundling" Project Pronto DSL facilities because the service would, they claim, merely allow resale. AT&T/WorldCom Rhg. Ex. 1.0 (Starkey) at 17; Covad Rhg. Ex. 1.0 (Carter) at 42. The Broadband Service offers CLECs much more than mere resale. *First*, the Broadband Service would be priced at the TELRIC-based rates applicable to UNEs, which provides a substantial price break over resale rates under the 1996 Act. *Second*, although the CLECs claim that resale does not allow service differentiation, the Broadband Service would allow such differentiation by enabling CLECs to order specific end-to-end arrangements that best meet their individual needs. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 34-35; *Project Pronto Order*, App. A at 34-36. CLECs can use the Broadband Service to provide a data-only ADSL service or a combined voice and data service. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 14 and Sch. CJB-4 and CJB-

[36] SBC's Chief Technology Officer, Mr. Ross Ireland, described these alternative technologies in his direct testimony on rehearing (at 10-15). They are also described in detail in the FCC's *Second Advanced Services Report*, ¶ 29-59.

5; *Project Pronto Order*, App. A at 34-36. They also can choose different classes of service (UBR or CBR) and the vintage of OCD port. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 34-35. In particular, CLECs create a "profile" for the specific version of the Broadband Service they wish to offer, specifying such things as upstream speed, downstream speed, aggregate power, and noise. *Project Pronto Order*, ¶ 30 n.82. The FCC stated that by creating such profiles, CLECs "can differentiate their product offerings." *Ibid.* Finally, as Rhythms witness Watson admitted, the Broadband Service is merely a component of a CLEC's service to its customer, as the CLEC must add items like interoffice transport to make the overall product work. Rhg. Tr. 1424-26 (Watson). All of these factors distinguish the Broadband Service from resale. In fact, the Broadband Service is not resale of a retail service at all, which is how the 1996 Act defines resale. 47 U.S.C. 251(c)(4). It is instead a brand new *wholesale* service tailored specifically to CLECs.

The following discussion applies the factors in Rule 317(b)(2) to each of the available alternatives. The analysis is not broken down by each of the proposed Project Pronto "UNEs" because, while the Order creates several new "UNEs," the alternatives would generally apply to all of them. Also, the CLECs have never stated that lack of access to any particular alleged "UNE" created by the Order impairs them, as they have instead focused on the Pronto DSL architecture as a whole.

(i) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer.

The Broadband Service. From the CLECs' perspective, use of the Broadband Service should be little or no different from using the Order's Project Pronto "UNEs" on an end-to-end basis — except that the Broadband Service would be cheaper. This is because the Broadband Service could be priced without the need to recover the millions of dollars Ameritech Illinois

would have to spend to be able to provide the Project Pronto "UNEs" created by the Order. Lower prices would make DSL service provided through the Broadband Service more competitive with cable modem service and other competing service technologies, such as Sprint's Broadband Direct high-speed wireless service.

Self-provisioning. Any carrier seeking to provide advanced services has to invest in new equipment. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 3, 17-18. Manufacturers provide this equipment to all carriers and it is readily and equally available to CLECs and ILECs, as the CLECs themselves have conceded. The FCC found in the *UNE Remand Order* that CLECs were actually ahead of ILECs in terms of deploying their own facilities for advanced services,[37] which indicates that such equipment is affordable. In Illinois, for example, Qwest announced in mid-May of this year that it would begin providing high-speed DSL Internet access in Chicago using entirely its own network facilities. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 13. Sprint likewise is self-provisioning its high-speed wireless Broadband Direct service.

DSLAM Collocation. As noted above, the CLECs have exaggerated the cost of DSLAM collocation at RT sites. Moreover, Dr. Aron established that, even using the costs alleged by the CLECs, the investment per potential customer associated with DSLAM collocation at RTs is actually less that the comparable investment that a cable modem service provider would make. Am. Ill. Rhg. Ex. 8.1 (Aron) at 12-14. Furthermore, Sprint has already featured DSLAM collocation at RTs as a key component, if not the leading component, of its DSL business plans.

[37] *UNE Remand Order*, ¶ 307 ("[A]dvanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country. Competitive LECs and cable companies appear to be leading the incumbent LECs in their deployment of advanced services. . . . Marketplace developments like the ones described above suggest that requesting carriers have been able to secure the necessary inputs to provide advanced services to end users in accordance with their business plans.")

Burt Cross Exhibit 3 (Rhg. Tr. 1863). Thus, there can be no credible claim that DSLAM collocation at RTs is not a cost-effective means of providing advanced services.

Other Technologies. The FCC has found that both up-front and incremental deployment costs of wireless technologies are generally much lower than the costs for cable modem and DSL service. *Second Advanced Services Report*, ¶¶ 42, 44-47. Such alternatives therefore are viable choices for CLECs seeking to provide broadband service. While some CLECs dismiss use of non-DSL technologies as unrealistic, these claims are refuted by Sprint's deployment of high-speed wireless broadband service as an alternative to its own DSL service. *See* Sprint Rhg. Ex. 3.0 (Burt) at 31; Am. Ill. Rhg. Ex. 1.0 (Ireland) at 13. If providing such service were cost-prohibitive, Sprint presumably would not be deploying and aggressively marketing it. Likewise, public documents of Rhythms and Covad show that they are considering alternative broadband technologies as well.[38]

(ii) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers.

The Broadband Service. CLECs using the Broadband Service would be able to enter and expand their presence in the advanced services market in just as rapid a fashion as Ameritech Illinois' advanced services affiliate, AADS. The Broadband Service would be available in new areas as the Pronto DSL facilities are deployed in those areas. "Unbundling," by contrast, would depend not just on deployment of new facilities, but also on the development of new operational support systems and logistical and management procedures, to the extent such development is technically feasible at all, which would be complex and time-consuming. *See* Am. Ill. Rhg. Ex. 5.0 (Hamilton) at 3-20; Am. Ill. Rhg. Ex. 13.0 (Waken) at 29-31.

[38] Ameritech Illinois' Petition for Interlocutory Review, at 8 and nn. 10-11 (citing SEC filings).

Self-provisioning. Ameritech Illinois lacks the necessary information to predict how quickly a CLEC might choose to use self-provisioning to enter or expand its presence in the advanced services marketplace, but the only constraint here is the CLEC's own business plan. As the CLECs concede, the equipment needed to provide DSL services is readily available to all buyers in the open market, from numerous vendors. Accordingly, the time to purchase and install that equipment and provision service would be identical for both CLECs and ILECs alike.

DSLAM Collocation at RTs. The standard provisioning interval for the wholesale Broadband Service is three days, which would be faster than DSLAM collocation at RTs. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 51. More importantly, however, the Broadband Service also would be faster and significantly less costly to provision than the Order's "UNEs," assuming Ameritech Illinois were to deploy any Pronto DSL facilities at all. A CLEC could use the Broadband Service in the interim while it pursued DSLAM collocation at RTs in its chosen areas. Because the processes and intervals for provisioning the Order's Pronto "UNEs" are unknown, it would be difficult to compare the provisioning times for those "UNEs" to DSLAM collocation at an RT. But more importantly, such a comparison could never occur, because Ameritech Illinois does not plan to deploy any Pronto DSL facilities given the "unbundling" and "collocation" requirements that the Order would impose on such deployment. Moreover, even if one accepted Sprint's estimate of six to eight months to establish DSLAM collocation at an RT (Sprint Rhg. Ex. 3.0 (Burt) at 23-24), that still falls within the FCC's guidelines for timely entry. *UNE Remand Order*, ¶ 189.

Other Technologies. As noted above, deployment of wireless service may offer unique speed of deployment advantages as compared to DSL or cable modem service, which would lead to faster market entry and expansion. *Second Advanced Services Report*, ¶¶ 42, 44-47.

(iii) Quality.

The Broadband Service. The Broadband Service obviously would offer the exact same quality of service as an end-to-end "UNE" or "NGDLC UNE Platform" using the Pronto DSL facilities. The Broadband Service comes in either unspecified bit rate ("UBR") or constant bit rate ("CBR") qualities of service ("QoS"). UBR has no dedicated bandwidth, but just uses what is available at the time. CBR requires dedicated bandwidth. There currently is a 96Kbps constant bit rate ("CBR") offering through the Broadband Service, with the limit set due to capacity constraints. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 33-34. Attempts to exceed that limit through a "UNE" offering where CLECs could demand higher-speed CBR or other qualities of service would have an adverse impact on the capacity of the system and the quality of other services. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 36. UBR service is ideally suited for high-speed Internet access and meets the needs of most mass market customers. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 12. It also has the advantage of allowing Ameritech Illinois to maximize the potential number of network "subscribers," which allows service to a larger number of end users and would maximize efficient use of the Pronto architecture. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 17. Another benefit of UBR service is that it helps keep prices for the high-speed Internet access service lower (*id.*), which in turn makes it more competitive with cable modem service. Thus, while CLECs may claim that imposing requirements on Ameritech Illinois to deploy different equipment or allow higher dedicated-bandwidth services would improve "quality" of service, there is always an offset in terms of higher cost and less bandwidth being available for mass market customers.

Self-provisioning. Self-provisioning would give CLECs substantially more control over the quality of service they provide than "unbundling" Pronto DSL facilities would. For example, while the CLECs have complained about the range of ATM QoS options available with the

Broadband Service, that is ultimately controlled by the vendor of the NGDLC and the technical limitations and parameters of that equipment, not by Ameritech Illinois. Accordingly, self-provisioning would allow CLECs to determine their own architecture and to deploy equipment that provided the QoS's that best met their business plans. Self-provisioning also would give CLECs the surest means of choosing equipment that would allow them to provide their preferred broadband services. For example, Sprint contends that its ION advanced service needs a VBR QoS. Sprint Rhg. Ex. 5.0 (Dunbar) at 31; Sprint Rhg. Ex. 3.0 (Burt) at 6-7. The Pronto DSL facilities intended for Illinois, however, do not provide for a VBR QoS and Alcatel has no firm plans to develop that capability. Sprint Rhg. Ex. 5.0 (Dunbar) at 31-32; Tr. 734 (Ransom) [39]; Tr. 1822-23 (Burt); Am. Ill. Rhg. Ex. 10.1 (Keown) at 12. Sprint could, however, provide VBR QoS through self-provisioning different equipment or DSLAM collocation at an RT.

DSLAM Collocation at RTs. The only quality of service issue that the CLECs have raised with regard to DSLAM collocation at RTs is cross talk, or spectral interference, which is refuted both by the CLECs' lack of evidence on the issue and the FCC's adoption of under condition (ii) of the packet switching rule. Because the CLECs would be collocating their own DSLAM equipment at the RT, this alternative to unbundling would, like self-provisioning, give the CLECs greater flexibility to offer different QoS's and thus better control over the quality of service provided to their customers.

Other Technologies. Sprint asserted some quality of service issues with providing wireless service, such as restrictions on the scope of service caused by line-of-sight restrictions.

[39] The CLECs may argue that Dr. Ransom's testimony is not credible because of a certain clause in the Purchasing Agreement between SBC and Alcatel regarding advocacy by Alcatel. That argument is frivolous. Dr. Ransom did not even know of the clause, so it obviously could not have affected his testimony. Rhg. Tr. 1818-19 (Ransom) (in camera). Further, the clause itself does not apply to sworn expert testimony regarding the capabilities of Alcatel's equipment, which is exactly what Dr. Ransom provided.

Sprint Rhg. Ex. 3.0 (Burt) at 31-32. However, Sprint's own marketing materials belie this assertion (Burt Cross Ex. 3). Also, at this time, satellite services do not provide high-speed uploading capability. This potential shortcoming, however, will lessen with time, and at this point appears to be outweighed by the relative speed of deployment and cost-effectiveness of that technology.

(iv) Ubiquity, including whether the alternatives are available ubiquitously.

The Broadband Service. The Broadband Service would be available with the same ubiquity as the Project Pronto DSL deployment itself. Of all the alternatives to "unbundling" Project Pronto DSL facilities, this would give the widest coverage.

Self-provisioning. Self-provisioning would allow the CLEC to determine exactly where it wants to deploy facilities to provide advanced services. In light of their apparent business models, of course, most CLECs are likely to care less about ubiquity and more about being able to target population centers and business centers. *See* Rhg. Tr. 1431-32 (Watson). Self-provisioning would allow CLECs to target those areas and, as mentioned above, deploy equipment capable of providing the desired kinds of service in the chosen areas.

DSLAM Collocation at RTs. The CLECs have argued that DSLAM collocation at RTs does not allow ubiquitous service because of space limitations in Ameritech Illinois' remote terminal locations and the time it would take to collocate in a significant number of RTs. SBC's ILECs committed in the *Project Pronto Order*, however, to take proactive steps to eliminate any situation where DSLAM collocation would be unavailable. *Project Pronto Order*, App. A at 38-39. Moreover, mandatory "unbundling" of Pronto DSL facilities creates its own ubiquity problems, both because such "unbundling" precludes any deployment of Pronto DSL facilities at all, and because even if it did not preclude such deployment, such "unbundling" would cause use of Pronto DSL facilities to be beyond Ameritech Illinois' control. Specifically, a CLEC that

leased one or more Permanent Virtual Paths ("PVPs") as UNEs would immediately monopolize from one-third to all of the DSL capacity in any given remote terminal.[40] By leasing PVPs, just a few CLECs could quickly make several remote terminals off limits to other CLECs and prevent those other CLECs from serving the area covered by that terminal. Similar ubiquity problems would arise whenever a CLEC demanded high-bandwidth PVPs and thus limited the bandwidth available to serve other customers in a given area. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 36. By contrast, allowing CLECs to use the wholesale Broadband Service rather than "unbundled" PVPs would avoid limitations on ubiquitous service by allowing Ameritech Illinois to ensure that all CLECs get the most efficient use of the Pronto DSL equipment, thus maximizing its capacity for serving all customers.

Other Technologies. Wireless and satellite services offer a trade-off between lower cost and faster speed of deployment and ubiquity of coverage. *Second Advanced Service Report*, ¶ 47. Moreover, deployment of wireless infrastructure is far less expensive than deployment of a wireline infrastructure. *Id*., ¶¶ 42-45.

(v) Impact on network operations.

The Broadband Service. Allowing CLECs to use the Broadband Service as the means of access to the Pronto DSL architecture would have very minimal impact on Ameritech Illinois' network operations and should not threaten network reliability. By contrast, requiring Ameritech Illinois to re-engineer its planned Pronto DSL deployment to fit all of the CLECs' demands in this proceeding would lead to adverse capacity and service impacts, as described in detail by Mr.

[40] This may change with future software releases for the Alcatel NGDLCs, but at this point there is no certainty about how such future releases would work. The CLECs agree that software release 11, on which they heavily rely, has not even been tested yet. Rhg. Tr. 1240 (Dunbar); Rhg. Tr. 1414 (Watson).

Boyer and Mr. Keown. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 4-18; Am. Ill. Rhg. Ex. 10.0 (Keown) at 10-16.

Self-provisioning. Mr. Boyer, Mr. Keown, and Mr. Hamilton discuss the adverse impact on Ameritech Illinois' network operations of an "unbundling" requirement for Pronto DSL facilities. Those adverse impacts could be avoided if CLECs relied on self-provisioning.

DSLAM Collocation at RTs. DSLAM collocation at RTs, under current rules and limitations, would not appear to have significant adverse impacts on Ameritech Illinois' network operations. It would, however, still allow CLECs to provide all the services they desire.

Other Technologies. Use of wireless or satellite technologies by CLECs should not affect Ameritech Illinois' network operations. Again, these technologies also could be used to provide functionally equivalent services to customers as DSL facilities.

* * *

In light of these alternatives to "unbundling" Project Pronto DSL facilities, it is clear that CLECs' ability to provide the services they desire is not "materially diminishe[d]" without such "unbundling." There are multiple, viable, cost-effective alternatives to such "unbundling" and the CLECs are able to, and do, compete effectively through those alternatives.

B. THE RULE 317(B)(3) FACTORS PROHIBIT ANY "UNBUNDLING" HERE.

Even if the Commission could and did independently find that impairment exists with regard to Ameritech Illinois' planned Pronto packet switching functionality, that would not end the analysis. A finding of impairment merely means that an agency "may" order unbundling (47 C.F.R. 51.317(b)(1)), not that it must. The next step in the analysis is to determine how the factors in Rule 317(b)(3) affect the wisdom of any proposed unbundling requirement. *Id*.; *UNE Remand Order*, ¶ 106. In making any unbundling decisions, the ultimate purpose is to apply a

limiting standard that is rationally related to the goals of the Act. *IUB II*, 525 U.S. at 391-92; *UNE Remand Order*, ¶¶ 26-27, 106. Those goals include promoting advanced services competition and deployment for the benefit of all consumers,[41] and the (b)(3) factors directly bear on those goals here. Thus, while the FCC's rules say that the (b)(3) factors "may" be considered, principles of reasoned decisionmaking and the goals of the Act itself require that the Commission consider those factors here if it were to undertake an impairment analysis.[42] *See, e.g.*, *Astroline Comms. Co. L.P. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

As a preliminary matter, it is important to note that the (b)(3) factors codify many of the concerns of Justice Breyer in his concurring opinion in *IUB II*, where he cautioned that excessive unbundling would prevent achievement of the goals of the Act. As Justice Breyer wrote, "compulsory sharing [of an ILEC's network] can have significant administrative and social costs inconsistent with the Act's purposes." *IUB II*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). Moreover, contrary to the CLECs' assumptions in this case, "increased sharing by itself does not automatically mean increased competition." *Id*. at 429. Rather, "[i]t is in the un shared, not in the shared, portions of the enterprise that meaningful competition would emerge." *Ibid*. This jives with the FCC's often repeated position that facilities-based competition is the most meaningful kind. It also is consistent with the view of economists that "the purpose of unbundling is to permit competition when it is the only way to do so, · · · not to allow competitors to provide service with less investment, nor is it to ratify any particular business plan that a competitor might have." Am. Ill. Rhg. Ex. 11.0 (Levin) at 16.

[41] 47 U.S.C 152 note (Section 706 of 1996 Act); 1996 Act, Preamble, 100 Stat. 56 (1996 Act intended to "encourage the rapid deployment of new telecommunications technologies").

[42] The Commission did not consider any of the (b)(3) factors in its Order.

Justice Breyer further recognized, in language that could have been written with this very case in mind, that unbundling requirements can easily prevent otherwise beneficial network investment:

> *Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement*. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. [Citation omitted]. And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide.

Id. (emphasis added). Justice Breyer explained that ILECs will not invest in new technologies if CLECs can deprive them of "the fruits of value-creating investment, research, or labor." *Id.* at 428-29.

The following discussion addresses the (b)(3) factors and demonstrates that, even if the Commission lawfully could independently analyze and find impairment here (which it cannot), the Commission ultimately should decline to impose any "unbundling" requirement on Pronto DSL facilities.

(i) Whether unbundling of a network element promotes the rapid introduction of competition.

The FCC has already found that deployment of Project Pronto DSL facilities subject to the terms of the *Project Pronto Order* would "promote[] the rapid introduction of competition." *Project Pronto Order*, ¶¶ 1, 23, 35, and 42. By contrast, imposition of the Order's Project Pronto requirements on that deployment would impede the development of competition. Deployment of the Pronto DSL facilities as planned by Ameritech Illinois, including offering the Broadband Service, would rapidly enable all DSL providers to reach a significantly larger number of new customers and thus more vigorously compete with cable modem and other broadband service providers. *See id.*, ¶¶ 1, 23; Am. Ill. Rhg. Ex. 1.0 (Ireland) at 22-23. This would be the fastest

way for all DSL providers to play catch-up with cable modem service. If Pronto DSL deployment were subjected to onerous "unbundling" and "collocation" requirements, however, these new facilities would not be deployed, and consumers and DSL providers would lose all of the benefits of this new and substantial network investment.

Even if Ameritech Illinois were to reverse course and deploy Pronto DSL facilities subject to the Order as it stands, the costs associated with the Order's Project Pronto requirements, which would have to be recovered from CLECs, would again impede competition. If rates for Project Pronto "UNEs" were set at a level that truly recovered their costs, the rates would likely be too high to allow DSL providers to be competitive with the prices of cable modem and other broadband service providers. Am. Ill. Rhg. Ex. 8.0 (Aron) at 39-42. Thus, not only would DSL providers not be able to use the Project Pronto "UNEs" to effectively compete in the advanced services market, but the CLECs would soon stop purchasing such UNEs at all, leaving Ameritech Illinois with no way to recover all of the up-front costs it would incur to make such "UNEs" available. *Ibid.* This is no idle concern. The CLEC community made many requests at the FCC during the proceedings leading to the *Project Pronto Order*, and the FCC adopted many conditions to address those CLEC requests. Almost a year later, however, no CLEC has taken advantage of those conditions, even though the SBC ILECs have had to invest substantial capital to be able to fulfill all the FCC's requirements. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 22-23; Am. Ill. Rhg. Ex. 1.1 (Ireland) at 3.

(ii) Whether unbundling of a network element promotes facilities-based competition, investment, and innovation.

"A fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies." *UNE Remand Order*, ¶ 110.

"Unbundling" of Project Pronto DSL facilities would not promote facilities-based competition, investment, or innovation and would affirmatively discourage "rapid deployment of new telecommunications technologies."

Such "unbundling" would discourage facilities-based competition and investment because if CLECs are able to lease parts of Ameritech Illinois' planned DSL network more cheaply than building their own facilities, they will not build. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 26-27. As leading antitrust scholars have explained, "[c]ompetition requires that inputs economically capable of being supplied competitively — that is, by numerous independent sources — be supplied in that manner. Forced sharing of such inputs acts as a disincentive to producing them competitively in the first place and exacerbates and prolongs agency supervision." P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 787, at 247 (Supp. 1999). Likewise, as a prominent telecom analyst stated in addressing broadband service and unbundling issues: "Why overbuild if one can lease it more cheaply than one can build it? We strongly suspect that the success of the UNE-P resale will adversely affect the incentive for facility based competition."[43] *See also* Speta, *supra* n.5 at 76, 91 ("[o]pen access rules may well reduce a broadband access platform owner's incentives to deploy the technology"; "such fundamental unbundling [of broadband platforms] may diminish a provider's early ability to ensure demand and returns sufficient to justify the initial deployment of the platform.")

In addition, while unbundling is viewed as a stepping-stone to facilities-based competition in the area of traditional local exchange service, that concept does not apply here. Broadband services require new investment in new equipment, no matter who the carrier is, and

[43] Prepared statement of Mr. Scott Cleland, Oversight Hearing: The Deployment of Broadband Technologies, before the Subcommittee on Telecommunications Trade and Consumer Protection, May 25, 2000 (included in Ameritech Illinois' Rehearing Appendix, Tab 9).

such new equipment is equally available to all carriers. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 3, 16-19; *UNE Remand Order*, ¶ 307. Thus, no stepping stone is necessary because the advanced services market is new, not an established, mature market in a monopoly-to-competition transition.

The FCC has already observed that "investments in facilities used to provide service to nascent markets [like that for advanced services] are inherently more risky than investments in well established markets." *UNE Remand Order*, ¶ 314. The Order's approach only increases that risk and would cause Ameritech Illinois and other carriers, like Verizon, to be very cautious before deploying any other new advanced services equipment. Deterring investment directly conflicts with the goals of the 1996 Act: "Although some investment [in advanced services infrastructure] has occurred to date, much more investment in the future is necessary in order to ensure that all Americans will have access to these services." *UNE Remand Order*, ¶ 317. Thus, "[t]o the extent that regulatory actions prevent consumers from benefiting from an otherwise competitive technology by making it unattractive to deploy, all customers lose." Am. Ill. Rhg. Ex. 11.0 (Levin) at 16.

Similarly, CLECs will not invest as much in their own facilities – which are the heart of the most meaningful competition – if they can instead rely on forced "unbundling" of all of the ILEC's new facilities. Indeed, in the FCC's *Project Pronto* proceedings and in numerous other FCC proceedings, the CLECs have argued strenuously for the imposition of numerous conditions and requirements that they claim are essential to their ability to provide advanced services. The FCC has imposed certain requirements as a result. Now the CLECs come to state commissions claiming that those FCC requirements don't go far enough. The reason is obvious: they are tantalized by the chance to take a *complete* free ride on the ILECs' facilities and compete without

any of the investment risk necessary to deploy their own facilities. "[W]hen government forces a company to provide [a] facility and regulat[es] the process to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 771b, at 175 (1996).

Finally, "unbundling" Project Pronto DSL facilities would discourage innovation. The FCC has agreed that "the incumbent LEC argument that unbundling [of packet switching facilities] may adversely affect innovation is consistent with economic theory." *UNE Remand Order*, ¶ 315. No company will spend the time and money necessary to innovate if "the fruits of" that innovation can be taken away by a forced sharing requirement. *IUB II*, 525 U.S. at 428-29 (Breyer, J., concurring). By contrast, the FCC has already found that deployment of Pronto DSL facilities subject to the *Project Pronto Order* conditions *would* both facilitate innovation and ensure that CLECs had adequate access to the features and functions of the Pronto DSL network in order to differentiate their services. *Project Pronto Order*, ¶¶ 43, 45-46.

Requirements that impede the development of competition, investment, and innovation obviously harm Illinois consumers. If Pronto DSL facilities are not deployed, or are required to be deployed in an inefficient manner that makes the resulting retail service prohibitively expensive, many consumers will be left with little choice in the broadband market but cable modem service providers. Those cable modem service providers (like AT&T), who are not required to offer competitors *any* access to their facilities and brazenly deny competitors even the opportunity to advertise,[44] will continue to entrench and expand their dominant market share. *See* Am. Ill. Rhg. Ex. 1.0 (Ireland) at 14-16; Am. Ill. Rhg. Ex. 8.0 (Aron) at 40-42. Consumers do not care very much about what specific technology is used to deliver their high-speed Internet

[44] Seth Schiesel, "Cable Giants Refuse to sell Ads to Internet Competitors," *New York Times*, June 8, 2001/http://www.nytimes.com/2001/ 06/08/technology/08LABL.html).

Service. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 11. What they care about is getting the service at a reasonable price, but if the only choice is cable modem service they will be stuck with whatever price AT&T feels like charging or else have to go without.

(iii) Whether unbundling of a network element promotes reduced regulation.

One goal of the 1996 Act is to "deregulate where market conditions warrant." *UNE Remand Order*, ¶ 113. The market conditions here certainly warrant deregulation, but "unbundling" Project Pronto DSL facilities would have precisely the opposite effect by *increasing* regulation. As Justice Breyer observed, every new unbundling requirement increases regulation: "[e]ven the simplest kind of compelled sharing . . . means that someone must oversee the terms and conditions of that sharing." *IUB II*, 525 U.S. at 428. And the "sharing" at issue here would be far from the "simplest kind." As Ameritech Illinois' witnesses have explained, there are serious technical and operational difficulties that would have to be addressed under the Order's Project Pronto requirement.[45] Some of these inevitably would require regulatory decisions regarding what is technically feasible, what is technically compatible, etc. Am. Ill. Rhg. Ex. 2.0 (Crandall) at 11 ("unbundling will be costly and will prompt disputes over the management of this evolving technology"). Thus, "the regulators, not the marketplace, would set the relevant terms" of the sharing, *IUB II*, 525 U.S. at 429, even though the marketplace here is already competitive and the leading participants are not subject to any of the terms imposed by the Commission's Order.

(iv) Whether unbundling of a network element provides certainty to requesting carriers regarding the availability of the element.

[45] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 33-50; Am. Ill. Rhg. Ex. 4.1 (Boyer) at 3-18; 35-43; Am. Ill. Rhg. Ex. 10.0 (Keown) at 10-16; Am. Ill. Rhg. Ex. 10.1 (Keown) at 4-12; Am. Ill. Rhg. Ex. 5.0 (Hamilton) at 3-20; Am. Ill. Rhg. Ex. 13.0 (Waken) at 29-33.

At first blush, any "unbundling" rule would seem to "provide[] certainty." But so would the Broadband Service alternative to "unbundling" Project Pronto DSL facilities. Mr. Ireland described Ameritech Illinois' proposal to extend the availability of the Broadband Service offering an additional year beyond that required by the *Project Pronto Order*, precisely to provide CLECs with more certainty as to its availability. The regulatory efficiency advantage of the Broadband Service is that it would be available long enough for any carrier to establish itself in the advanced services market, but ultimately would expire on its own, rather than requiring the Commission (or the FCC) to go through another entire proceeding to decide when the Project Pronto "UNEs" would no longer have to be unbundled.

(v) Whether unbundling of a network element is administratively practical to apply.

For the same reasons stated under factor (iii) (reduced regulation), "unbundling" of Project Pronto DSL facilities would not be administratively practical to apply. There are many complex technical issues involved with such "unbundling," and the issues are likely to keep changing as the technology changes, which change is rapid and constant. Further, administrative practicality means that the agency can "apply the rules efficiently to respond to changes in the marketplace." *UNE Remand Order*, ¶116. The Order's requirements here are not designed to be fluid and adaptable, but rather apply to one particular deployment initiative (Project Pronto DSL) by one carrier (Ameritech Illinois) and therefore are likely to lead to administrative difficulty, not practicality.

C. THE ORDER'S ATTEMPT TO IMPOSE "UNE COMBINING" REQUIREMENTS VIOLATES *IUB I* AND *IUB III*.

The Order (at 25) explicitly requires Ameritech Illinois to combine UNEs for CLECs, stating that Ameritech Illinois must make available to competitive providers "*any combination* [of the list of new UNEs], including a line shared xDSL loop from the OCD port to the NID."

(Emphasis added). This requirement violates the Eighth Circuit's holdings in *IUB I* and *IUB III* that the plain language of the 1996 Act – which binds this Commission and overrides any contrary state law – forbids any requirement that an incumbent affirmatively combine UNEs for CLECs, and therefore is preempted.

Under the Order as written, it is Ameritech Illinois that would bear the responsibility (and cost) of taking the "unbundled copper subloop" and the "unbundled OCD/NGDLC/lit fiber combination" and combining those network elements with the CLEC's network element (the NGDLC line card) in order to create the end-to-end combination of elements capable of supporting DSL services. The Order (at 25) directs *Ameritech Illinois* to provide "any combination [of alleged UNEs] . . . including a line-shared xDSL loop from the OCD port to the NID." This, by definition, is a *new* combination of network elements, as Ameritech Illinois' facilities obviously would not have been previously combined with the *CLEC's* "collocated" line card.[46] The only party with the ability to combine the "UNEs" would be Ameritech Illinois, and the combining would be complete once Ameritech Illinois installed the line card.[47]

Nor could CLECs do the combining even if they wanted to, even if Ameritech Illinois were willing to give them unfettered access to its equipment. Assuming that the CLEC used a compatible Alcatel line card, it could not establish service "until the software controlled

[46] The Order's current "any combination" language on page 17 also would appear to require Ameritech Illinois to affirmatively combine its own network elements into any new UNE combinations of the CLEC's choosing, such as a UNE combination consisting of just an OCD port and a copper subloop between the RT and the end-user's premises. Such a result, of course, not only would be unlawful, but also impossible (and nonsensical). The "any combination" language should therefore be revised or eliminated.

[47] As both Dr. Ransom and Mr. Ireland explained, however, this act of combining network elements would not mean that the resulting combination would be capable of provisioning service. Rather, Ameritech Illinois would have to engage in significant additional activity, requiring the development of additional OSS functionalities and other support functions (such as ensuring that the appropriate software loading exists and the specific service specifications established), before service actually could be provisioned over that combination. Am. Ill. Rhg. Ex. 10.1 (Keown) at 3.

configuration and provisioning functions are completed."[48] The CLEC would not be able to do that because "[i]n the case of Alcatel's Litespan® products, the software can only be accessed by the system owner, subject to the manufacturer's licensing terms and warranty provisions."[49] As a result, Ameritech Illinois would be the only company capable of combining "UNEs" for the CLEC.

D. THE ORDER THREATENS TO UNLAWFULLY REQUIRE AMERITECH ILLINOIS TO BUILD NEW FACILITIES FOR CLECS AND TO PROVIDE THEM WITH A SUPERIOR QUALITY NETWORK.

Although several courts have already held that an incumbent LEC cannot be required to build new facilities solely to meet a CLEC's unbundling request or to provide it with a superior quality network, the Order threatens to impose both requirements – and the CLECs have made clear on rehearing that a superior-quality requirement is exactly what they want. The Order states (at 24):

> [I]n deploying this new network, Ameritech-IL must comply with its FCC - and Commission - mandated interconnection unbundling and access obligations. If Ameritech-IL has failed to deploy all equipment necessary to meet these obligations, it must do so now.[50]

This assertion violates the Eighth Circuit's holdings in *IUB I* and *IUB III*. *IUB I* and *IUB III* held that an incumbent LEC can be required to provide unbundled access to its *existing* network only, not to construct new facilities simply to provide a UNE that a CLEC desires. *IUB*

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[48] Am. Ill. Rhg. Ex. 3.0 (Ransom), Sch. NR-1 (Alcatel 10/12/00 FCC Comments at 19).

[49] *Ibid*.

[50] Significantly, the Rehearing Order in Dockets 00-0312/0313 eliminated the second quoted sentence and stated that it did not intend to require Ameritech Illinois to provide CLECs with superior quality access to its network or deploy Project Pronto any differently than planned. That is a large step in the right direction that, at a minimum, should be repeated in this case. However, even the Rehearing Order still threatens to violate the rule against superior quality requirements, as explained in Ameritech Illinois' Exceptions to the Rehearing HEPAD.

III, 219 F.3d at 757-58[51]; *IUB I*, 120 F.3d at 813; *see also UNE Remand Order*, ¶ 324 ("we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC . . . requirements for facilities that the incumbent LEC has not deployed for its own use"); *Michigan Bell Tel. Co v. Strand*, Case No. 98-CV-74727-DT, slip op. at 12-13 (E.D. Mich., June 9, 1999) (included in Ameritech Illinois' Rehearing Appendix, Tab 10). Requiring Ameritech Illinois to deploy, as part of Project Pronto, DSL equipment that is different from what Ameritech Illinois had previously planned to deploy and that is not part of Ameritech Illinois' existing network would clearly violate this principle.

There can be no debate that the Order, as currently written, threatens to illegally require Ameritech Illinois to install or construct new facilities solely to meet a CLEC's unbundling request and to provide CLECs with a "superior quality" network. In particular, the CLECs seek a requirement that would force Ameritech Illinois to deploy new types of NGDLC line cards (and all the associated software) as soon as they are approved by Alcatel or a licensed manufacturer – even if Ameritech Illinois otherwise had no plans to deploy such line cards and believed that they created technical difficulties in terms of service provisioning or service compatability, made no economic sense, or would threaten network reliability or the capacity of the system. Such mandatory addition of both physical equipment and software to the network would be an illegal superior-quality requirement. Rather, the deployment of any new types of line cards or other capabilities that Ameritech Illinois would not otherwise deploy should be addressed in the national collaborative or customer request processes established under the

[51] The Supreme Court has granted certiorari on other issues in *IUB III*, but not the superior quality holding. Thus, on this issue *IUB III* is now the final and non-appealable law of the land and is not subject to collateral attack in this proceeding.

Project Pronto Order.[52] It also is undisputed that (1) the only way a fiber pair in the DSL-related Project Pronto network could carry both voice and data traffic would be if additional equipment were purchased and added to the NGDLC at the RT to enable it to perform wave division multiplexing on the traffic coming from the end user, and (2) the Project Pronto network, as currently being deployed and as planned to be deployed, does not contain the equipment needed to perform wave division multiplexing. Thus, if the Order remained unchanged and Ameritech Illinois chose to continue to deploy DSL-related Project Pronto facilities, Ameritech Illinois apparently would have to, upon a CLEC's request, purchase specially and install wave division multiplexing equipment – which it does not need and would not use for serving its own customers – merely to meet an unbundling request. Even if this were not the case, it is clear that, if Ameritech Illinois were to go forward with its planned deployment of DSL-related Project Pronto facilities, Ameritech Illinois would have to purchase and deploy additional DSL-related facilities to accommodate the network inefficiencies and premature capacity exhaust that the Order's Project Pronto requirement would create. Am. Ill. Rhg. Ex. 10.0 (Keown) at 10-16.

Ameritech Illinois is entitled to build its network as it sees fit and as needed to serve its own customers. The Order, however, improperly creates an unbundling obligation for facilities that have yet to be deployed and then suggesting, without statutory support, that Ameritech Illinois might be forced to change its deployment plans to meet that requirement.

III. ISSUE 3: A LINE CARD "COLLOCATION" REQUIREMENT IS INCONSISTENT WITH FEDERAL LAW.

[52] The CLECs may also use their brief to seek a mandate that Ameritech Illinois redeploy OCD cards that are not part of the network today, or to let CLECs put their own cards where OCD cards used to be. The first request is plainly a superior quality requirement to deploy new equipment just for CLECs, and is unlawful, while the second request is unlawful for the same reasons that the Order's NGDLC line-card "collocation" requirement is unlawful.

The record on rehearing has clarified some of the issues surrounding "collocation" of CLEC-owned line cards. Dr. Niel Ransom, the Chief Technology Officer of Alcatel USA, Inc., which makes the ADLU line cards that would be used in Project Pronto NGDLCs (which also are supplied by Alcatel), testified that ADLU cards that are not manufactured or licensed by Alcatel simply will not work with the Alcatel NGDLC systems. Am. Ill. Rhg. Ex. 3.0 (Ransom) at 3-4. The CLECs conceded this point, testifying that they now recognized the problem of incompatible NGDLC line cards and had no intent or desire to be allowed to "collocate" incompatible cards.[53] Thus, one of the many technical issues raised by Ameritech Illinois' Application for Rehearing – the incompatibility of non-Alcatel-approved ADLU cards – apparently has now been resolved.

The CLECs also have effectively admitted that they do not need line card "collocation" at all, but rather would be content with the ability to use individual ports on line cards (which could occur only as part of an end-to-end service, and is not collocation at all) as long as they could differentiate their services.[54] Use of a line card port and the ability to differentiate are already included in the Broadband Service that would be available to CLECs if Pronto DSL facilities are deployed. *See Project Pronto Order*, ¶ 30 n.82 and App. A at 35; Am. Ill. Rhg. Ex. 4.0 (Boyer) at 30-32. Thus, it is clear that the CLECs' actual business (as opposed to regulatory) desires could be met without any "collocation" requirement at all.

All of this does not mean, of course, that line card "collocation," even of Alcatel-approved cards, is either feasible or compliant with controlling law. While the CLECs may now

[53] Covad Rhg. Ex. 2.0 (Gindlesberger) at 6-7; Rhythms Rhg. Ex. 1.0 (Watson) at 29; Sprint Rhg. Ex. 3.0 (Burt) at 31. Of course, the CLECs never acknowledged such compatibility problems until faced with Dr. Ransom's testimony.

[54] Sprint Rhg. Ex. 3.0 (Burt) at 4; Sprint Rhg. Ex. 5-0 (Dunbar) at 30, 33, 41.

not want to "collocate" incompatible line cards, they do want the ability to force Ameritech Illinois to deploy and allow CLECs to use *any* line card manufactured or licensed by Alcatel as compatible with the Litespan NGDLCs in the future as soon as it becomes available. *See* Rhythms Rhg. Ex. 1.0 (Watson) at 29; Sprint Rhg. Ex. 3.0 (Burt) at 47. That demand ignores the economic, technical and capacity-related problems that could arise from such forced deployment of equipment different from that which Ameritech Illinois might otherwise deploy. The FCC already has recognized these concerns and concluded that a reasonable way to deal with future technological developments regarding the Pronto DSL architecture is through the national collaborative sessions. *Project Pronto Order*, ¶¶ 43-46 and App. A at 37, 42. A forced deployment requirement would render the FCC's decision on the issue and the entire collaborative process moot. There also are numerous operational and administrative problems, including service provisioning and maintenance and repair problems, that would arise with NGDLC line card "collocation," which the CLECs fail to acknowledge. Am. Ill. Rhg. Ex. 5.0 (Hamilton) at 3-20.

E. LINE CARD "COLLOCATION" DOES NOT MEET THE "NECESSARY" REQUIREMENT OF SECTION 251(c)(6).

Collocation lets competitors occupy space on an ILEC's private property for the purpose of either interconnecting with the ILEC's network to mutually exchange traffic between the two carriers' customers, or gaining access to UNEs. It is, in effect, a legislatively authorized taking of the ILEC's property. Because it is still a taking, however, regulators requiring collocation cannot mandate more than is absolutely "necessary" for CLECs to interconnect or gain access to UNEs. 47 U.S.C. 251(c)(6); *see GTE Service Corp. v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000). In other words, regulators must avoid "unnecessary takings of LEC property" by

rejecting proposals that are "overly broad and disconnected from the statutory purposes enunciated in § 251(c)(6)." *Id*. at 421-22.

Under Section 251(c)(6), collocation can be required only where "necessary" for network interconnection or access to UNEs. The FCC initially tried to interpret "necessary" broadly to include any equipment "used and useful" for these purposes, but the D.C. Circuit rejected that reading as "diverg[ing] from any realistic meaning of the statute." *GTE Service*, 205 F.3d at 424. Rather, the D.C. Circuit held that "necessary" means "*required or indispensable* to achieve a certain result." *Id*. at 422 (emphasis added).[55]

"Collocation" of ADLU cards does not meet this "required or indispensable" test. For one thing, such cards are not even used (and cannot be used) for network interconnection or access to UNEs, as explained below. Further, there is already an existing alternative to line card "collocation" – DSLAM collocation at or in RT sites. The Order dismissed this alternative because it is purportedly "expensive" and because CLECs purportedly "would not be able to compete efficiently and effectively" by using it. Order at 29. The CLECs have tried to play up those themes during rehearing, but they have never even requested DSLAM collocation at RTs in Illinois. More importantly, they have provided absolutely no evidence or experience to support their claims.

As a matter of law, the alleged expense of DSLAM collocation at an RT, or the "presumed cost savings" of line card "collocation," cannot be considered in the "necessary" analysis under Section 251(c)(6). *GTE Service*, 205 F.3d at 424 (reversing FCC collocation rule that was based on "lower[] cost" to CLEC of collocating one type of equipment as opposed to

[55] Note that the "necessary" test of Section 251(c)(6) is separate and independent from the "necessary" test in Section 261(c), which also must be satisfied before a state commission can apply any new unbundling or collocation requirements like those in the Order. *See* Am. Ill. Appl. for Rhg. at 56-58 (incorporated by reference). The Order failed to apply that test.

another). The same goes for the Order's conclusion and the CLECs' claims that DSLAM collocation at RTs entails considerable planning and delays. "[A]s noted by the Supreme Court in Iowa Utilities Board, '*delay and higher costs for new entrants* . . . [that may] impede entry by competing local providers and delay competition' *cannot be used by [an agency] to overcome statutory terms* in the Telecommunications Act of 1996." *Id*. at 426 (emphasis added). The question here is necessity, not what might meet each individual CLEC's business plan.

The CLECs' claim that line card "collocation" is necessary for them to differentiate their services is also irrelevant. Section 251(c)(6) refers only to what is "necessary" for interconnection or access to UNEs, not to everything that a CLEC thinks might be useful for other purposes. The D.C. Circuit rejected the FCC's attempt to require collocation of any CLEC equipment solely because it "increases the services [CLECs] can offer their customers," finding that such an interpretation of "necessary" was improper. *GTE Service*, 205 F.3d at 424. Furthermore, CLECs *are* able to differentiate their services without line card "collocation." As Mr. Boyer explained, the various configurations and speeds of service available with the Broadband Service would allow for differentiation within the limits of the Pronto DSL architecture.[56] And if differentiation is really what the CLECs want, collocating their own DSLAMs at RTs would provide those CLECs with at least as much freedom to differentiate services as "collocating" a line card in a system chosen by SBC.

In short, given the availability of DSLAM collocation at remote sites and the space-enhancing commitments of the *Project Pronto Order*, there is no legitimate argument that "collocation" of ADLU line cards is "necessary" to interconnect networks or access any existing UNE. Arguments resting on economic infeasibility claims or subjective CLEC views of what is

[56] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 30-32; Am. Ill. Rhg. Ex. 4.1 (Boyer) at 33-35; *Project Pronto Order*, ¶ 30 n. 82.

useful, rather than an actually necessary for the purposes defined by Section 251(c)(6), are legally irrelevant to the Section 251(c)(6) analysis.[57] Because such arguments are all the CLECs have, line card "collocation" is not appropriate.

F. LINE CARDS ARE NOT AND CANNOT BE USED FOR INTERCONNECTION AND ACCESS TO UNES.

As noted above, collocation is permissible for two purposes only: interconnection with the incumbent LEC's network and access to UNEs. 47 U.S.C. § 251(c)(6). Line cards are not and cannot be used for either purpose.

Interconnection. The FCC's rules define "interconnection" as the "linking of two networks for the mutual exchange of traffic." 47 C.F.R. 51.5. This link must be an actual physical connection. *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997). On rehearing, no CLEC even attempts to claim that a line card provides interconnection. The Order, however, mistakenly concluded that "[l]ine cards are the point of interconnection with the ILEC fiber-fed NGDLC network, substituting for a traditional DSLAM and splitter." Order at 29. Besides incorrectly equating a line card with a DSLAM (which it is not, as explained above), this conclusion is directly contrary to the requirements that "interconnection" must be physical and must involve both "two networks" and the "mutual exchange" of traffic.

First, and perhaps most importantly, there is *no* mutual exchange of traffic between two carrier's networks at an NGDLC line card. Rather, the line card is simply a component of a facility that *one* carrier uses to receive and deliver *its* traffic to and from *its* customers. There is no "mutual exchange" of traffic flowing from one carrier's customers to the other carrier's

[57] A recent arbitration decision in Texas likewise concludes that line card "collocation" does not meet the "necessary" standard of Section 251(c)(6). *Texas Arbitration Award* at 94. As Worldcom and Rhythms have conceded in Texas, however, the arbitrator's decision is not final and cannot become final until the parties submit, and the Texas PUC approves, a conforming interconnection agreement. *See* Worldcom's Response to Southwestern Bell Telephone Company's Motion for Reconsideration of Arbitration Award, Dockets 22168 and 22469 (Pub. Util. Comm'n of Texas, filed July 27, 2001).

customers, and there could never be such mutual exchange of traffic at such a line card. That can occur only at other points in the ILECs' network, through the use of interconnection trunks.

Second, the alleged "ILEC fiber-fed NGDLC network" is not a network at all, at least not as contemplated by the FCC's rule. There can be only one ILEC "network" for interconnection purposes, and fiber-fed NGDLC facilities are only a small part of that network. Moreover, even if there were a "fiber-fed NGDLC network," it is undeniable that the line card itself is not the *CLEC's* complete "network." The CLEC's "network" for interconnection purposes would include its switches, interoffice facilities, etcetera. A line card cannot be a "network" in and of itself. Indeed, the FCC itself stated that a line card is "only one component of an NGDLC system." *Project Pronto Order*, ¶ 4 n.11.

Third, given that line cards are placed in a single slot in a channel bank assembly and integrated with the rest of the NGDLC, *ibid*., they are actually *incapable* of connecting two different networks, as they are inseparable from the rest of the Pronto DSL packet switching facilities and, more importantly, inaccessible by any CLEC equipment. As the manufacturer of the Pronto NGDLCs for Illinois has stated, its NGDLC system "cannot be used without the line cards. Conversely, the line cards cannot be separately accessed from other equipment." Ransom Rhg. Direct, Sch. NR-1 (Alcatel 10/12/00 FCC Comments at 15). More specifically, Alcatel explained that "it is not possible to directly access or interconnect with these line cards" and "[i]t is not possible to provide external access to internal NGDLC components or software," which includes "channel bank shelves and individual facilities and service line cards."[58] In short, the

[58] Am. Ill. Rhg. Ex. 3.0 (Ransom), Sch. NR-2 (Alcatel 11/14/00 FCC Reply Comments at 2, 6-7) ("it is not possible to directly access or interconnect with these line cards") ("Alcatel has repeatedly noted that it is not possible to interconnect directly with NGDLC line cards"); *id*., Sch. NR-1 (Alcatel 10/12/00 FCC Comments at 25).

line cards in the NGDLC are mere components in the transmission path in one network – the ILEC network – and do not serve to interconnect two discrete networks.

Access to UNEs. A line card also cannot be used to gain "access" to any UNE. CLECs have argued that a line card could be used to access a subloop on either the customer side or the central office side of an RT. Rhythms Rhg. Ex. 1.0 (Watson) at 21. The FCC's rules, however, make clear that access to subloops is available only at accessible cross-connect points. *UNE Remand Order*, ¶ 206; 47 C.F.R. 51.319(a)(2). The line card does not provide an accessible cross-connect point. Rather, it resides in a slot within a channel bank within an NGDLC. The slot in the channel bank, not the line card, is hard-wired to the NGDLC's backplane. Thus, only the rest of the NGDLC itself, not a separate subloop, is accessible from the channel bank slot. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 39-40 and Sch. CJB-7.

The CLECs do not dispute that this hard-wired connection cannot be broken to access subloops from the RT. Instead, they claim that Ameritech Illinois should have designed Project Pronto differently and included some type of cross-connect field at each Project Pronto remote location (though the CLECs disagree widely about the size of such a cross-connect field).[59] As Mr. Keown explained, providing such a cross-connect field at every RT could increase costs for Project Pronto by tens of millions of dollars in Illinois.[60] Mr. Welch explained why the planned hard-wired configuration is economically and technically reasonable and in accord with past practice and sound network engineering.[61] The essential point, however, is that the CLECs are not authorized to dictate how Ameritech Illinois designs and engineers its facilities; the CLECs'

[59] Rhythyms Rhg. Ex. 2.0 (Watson) at 13-14; Sprint Rhg. Ex. 5.0 (Dunbar) at 25.

[60] Am. Ill. Rhg. Ex. 10.1 (Keown) at 8; Am. Ill. Rhg. Ex. 6.1 (Welch) at 5-6.

[61] Am. Ill. Rhg. Ex. 6.0 (Welch) at 13-14; Am. Ill. Rhg. Ex. 6.1 (Welch) at 5-6.

right is to request access to the ILEC's network as it exists at that time. *IUB III*, 219 F.3d at 750-51; *see also* Rhg. Tr. 1412 (Watson) and 1833-34 (Dunbar) (CLEC witnesses admitting same). And to the extent the CLECs actually want to access subloops from a Project Pronto RT, the *Project Pronto Order* (App. A at 39-40) requires Ameritech Illinois to perform, at a CLEC's request, an Engineering Controlled Splice at an RT to allow CLECs to access copper pairs from that RT. The FCC obviously found this to be an acceptable means of copper facility access within this architecture.[62]

The CLECs' latest proposal for line cards, which arose for the first time on rehearing, is that they supply line cards to Ameritech Illinois but obtain access to such cards only on a port-at-a-time basis. For example, a CLEC might supply Ameritech Illinois with 20 four-port line cards, thus giving it a "credit" of 80 ports on such cards. Ameritech Illinois would then fill the CLEC's order based on that "credit," with the CLEC providing more cards when the credit ran low. The problem with this new proposal is that, first of all, it would require CLECs to share line cards with one another and thus could work only if all CLECs agreed to it (Rhg. Tr. 1433 (Watson)), and some CLECs might not want to share cards. The proposal also clearly is not one for "collocation" at all, as the CLECs would not be placing any equipment at all, but rather just using up capacity credits on some type of equipment. A capacity allocation is not something that can be "collocated." Further, this proposal still would place the costs and burden on Ameritech Illinois to develop all of the new systems and procedures necessary to track line cards, port credits, etc. for numerous CLECs. *See* Am. Ill. Rhg. Ex. 5.0 (Hamilton) at 3-20.

[62] The CLECs have also argued that a line card could be used to access a PVC or a PVP. These, however, are not UNEs because they are part of the packet switching functionality. As explained above, such functionality can be unbundled only if the four conditions of Rule 319(c)(5) all exist, which is not the case in Illinois.

The CLECs also attempt to draw distinctions based on who "owns" the line card, arguing that if Ameritech Illinois "owns" the card the operational problems of "collocation" would somehow disappear. That claim is a red herring. The dispositive question is not who "owns" the line card, but who *designates* and *controls* it. Under any of the CLECs' scenarios it would be the CLEC that designates and controls use of the card: the CLEC would pick the kind of card to "collocate," decide whether it could be shared with others, and decide when it could be removed. This is another example of how the Order would increase Ameritech Illinois' costs and risks and relieve CLECs of any investment responsibility.

Moreoever, this latest CLEC "what if" proposal begins to sound very much like the Broadband Service that Ameritech Illinois is prepared to offer. That too would involve port-at-a-time provisioning rather than assignment of complete line cards, the main differences being that with the Broadband Service (1) Ameritech Illinois would have to manage only one inventory (its own) and (2) all of the administrative costs detailed by Mr. Hamilton and Mr. Waken would be avoided. The only open question would be what types of cards Ameritech Illinois would agree to deploy in the NGDLCs, but that is an issue properly addressed in the national collaboratives established under the *Project Pronto Order*.

In sum, because ADLU cards are not and cannot be used for interconnection or access to UNEs, as those terms are defined and applied under the 1996 Act, CLECs cannot be allowed to "collocate" such cards in Project Pronto RTs.

G. THE ORDER ILLEGALLY ALLOWS CLECS TO DICTATE WHERE COLLOCATION EQUIPMENT WOULD BE PLACED.

The Order also violates federal law by allowing CLECs to dictate where on Ameritech Illinois' premises their so-called "equipment" (line cards) would be "collocated." The FCC originally issued collocation rules that required incumbent LECs to allow CLECs to collocate

equipment "in any unused space within the incumbent's premises" and allowed CLECs to "choose where to establish collocation on the LEC's property." *GTE Service,* 205 F.3d at 426. The D.C. Circuit, however, vacated that rule, holding that "[t]here is nothing in [section] 251(c)(6) that endorses" allowing a CLEC to "pick and choose preferred space on a ILEC's premises." *Ibid*.

"Picking and choosing preferred space on the ILEC's premises," however, is exactly what the Order allows CLECs to do. The point of the D.C. Circuit's decision is that the ILEC ought to be able to determine where the equipment goes on its property; after all, traditional stand-alone collocation equipment will work wherever it is placed. The Order, however, requires Ameritech Illinois to let CLECs "collocate" line cards *inside* a specific piece of *Ameritech Illinois'* equipment, the NDGLC, and to *functionally integrate* those line cards with the rest of the hardware and software in the NGDLC. Order at 29; *see Project Pronto Order*, ¶ 4 n.11 (describing line cards). Thus, the CLEC alone would completely dictate where on Ameritech Illinois' premises the line card would be "collocated" (*i.e.*, in a particular channel bank assembly and slot in the NGDLC). The D.C. Circuit has held that "nothing in [section] 251(c)(6) . . . endorses this approach." *GTE Service*, 205 F.3d at 426.

Ameritech Illinois recognizes that the ADLU line cards will not work anywhere but in the NGDLC, but that simply highlights why this requirement is not *co-location* at all, but rather is *co-engineering*. The D.C. Circuit said ILECs could choose where collocation equipment goes. That makes sense so long as the equipment has independent functionality, which was the case for every authorized piece of collocation equipment until now. But with line cards, the placement matters, which is why the Order's requirement cannot even be considered "collocation."[63]

[63] The Order also violates the Act under *GTE Service* because it allows for collocation of multi-use equipment. *See* Am. Ill. Appl. for Rhg. at 52-53 (incorporated by reference).

In rough terms, a collocation requirement is like allowing a CLEC to place its computer in the same room as the incumbent's and to use wires to connect the two, say, to exchange e-mail. This might make sense because it saves the CLEC from having to own a separate building and makes connection of the computers easier, but it doesn't matter where in the room the CLEC's computer goes. A *co-engineering* requirement, by contrast, is like allowing the CLEC to install its own hard disk and operating system inside the incumbent's computer and, by thus accessing that computer's proprietary software, to use up that computer's memory and processing capacity, and hence to dictate what the incumbent's computer can do. That is effectively what the Order requires. Such a co-engineering burden is both unprecedented and unlawful: If CLECs are not allowed to "pick and choose preferred *space* on the ILECs' premises" to locate their equipment, *GTE Service*, 205 F.3d at 426, it is beyond question that they cannot pick and choose preferred *components of the ILEC's equipment* that they want to replace.[64]

H. LINE CARDS HAVE NO INDEPENDENT FUNCTIONALITY AND THEREFORE ARE INELIGIBLE FOR COLLOCATION.

It is undisputed that line cards have no functionality of their own and are useful only when integrated with the rest of the equipment in an NGDLC system.[65] The FCC, however, has always been clear that its collocation rules apply only to complete pieces of equipment with stand-alone functionality. *See* 47 C.F.R. 51.323(b), *partially vacated by GTE Service*. For example, the type of equipment normally associated with collocation, such as a DSLAM or

[64] The effect of the Order is no different than allowing CLECs to "collocate" software in an incumbent LEC's switch to help differentiate or control their services. The FCC refused any such requirement in the *Local Competition First Report and Order* (¶ 415), finding that "the incumbent LEC is not required to relinquish control over the operations of the switch" by letting CLECs install their own software. The same decision also held that unbundled local switching would not entail "physical division of the switch." *Id*., ¶ 416. The line card "collocation" requirement, however, plainly requires "physical division" of a channel bank assembly in an NGDLC by letting CLECs occupy individual slots in the channel bank.

[65] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 47-48; Am. Ill. Ex. 6.1 (Lube) at 21; *Project Pronto Order*, ¶ 4 n.11.

spectrum splitter, can be connected to other equipment but still provide a unique function or functions of its own without relying on the other equipment. An ADLU card, by contrast, cannot be connected to other equipment and provide a unique function of its own, as its functionality depends entirely on interacting with all the other parts of the NGDLC system.[66] The ADLU card is like a gear in a wristwatch, something that helps the entire system do its job but that, when isolated from the system, is of no use. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 47-48. Here, for example, connecting a line card to a subloop (which is impossible, as described below) would be useless; the line card does nothing when it is outside the rest of the NGDLC. Likewise, the line card is not the piece of equipment that acts as a connection point to the CLEC's network; rather, it is an integrated piece of the NGDLC and cannot be directly connected to any equipment owned or leased by the CLEC. Am. Ill. Rhg. Ex. 3.0 (Ransom), Sch. NR-2 (Alcatel 11/14/00 FCC Reply Comments at 6) (Alcatel has repeatedly noted that "it is not possible to interconnect directly with NGDLC line cards. . . . Circuits are provisioned end-to-end through the NGDLC systems.") (emphasis in original).

IV. ISSUE 6: TECHNICAL AND PRACTICAL INFEASIBILITY.

The record establishes that the Order's Project Pronto requirements would create severe operational problems and network inefficiency, and in many respects, are not technically feasible. A technical feasibility analysis must include consideration of the impact a new requirement would have on the ILEC's network: "legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to

[66] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 47-48; Am. Ill. Ex. 6.1 (Lube) at 21; *Project Pronto Order*, ¶ 4 n.11; Am. Ill. Rhg. Ex. 3.0 (Ransom), Sch. NR-1 (Alcatel 10/12/00 FCC Comments at 15).

incumbent LEC networks. Negative reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network."[67] The Order's "unbundling" and "collocation" requirements do not pass this test.

The CLECs appear to claim that the Order's requirements do not lead to technical or economic infeasibility because SBC allegedly always intended to "unbundle" the Pronto DSL architecture and allow CLECs to own ADLU cards. This argument is based on a gross misconstruction of outdated SBC documents. In particular, Rhythms tries to characterize several SBC documents as envisioning multiple Project Pronto UNEs, when it is clear that what SBC once called the "Broadband UNE" and now calls the Broadband Service was always an end-to-end offering only. *See* Am. Ill. Rhg. Ex. 4.1 (Boyer) at 37; Rhg. Tr. 1109-14 (Boyer). In fact, the FCC's diagram of the Broadband Service in the *Project Pronto Order* contains the same "UNE" language that Rhythms deems so significant, but the FCC obviously did not view the separate components of the Broadband Service as UNEs or the end-to-end service as a UNE. Rhg. Tr. 1172-74 (Boyer). Rhythms used a similar selective quotation tactic to claim that SBC always anticipated and planned for CLECs owning ADLU cards. The documents Rhythms relies on, however, all make clear that this was always just one of many alternatives under consideration early on (especially when there was a concern that the FCC's SBC/Ameritech merger order may have required that third parties own the line cards), and that it was abandoned after the *Project Pronto Order*. *See* Rhg. Tr. 1458-62 (Watson). In any event, Rhythms' "gotcha" approach ignores the fact that it is agencies and courts alone that decide what elements

[67] First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325 (rel. Aug. 8, 1996), at ¶ 203 (subsequent history omitted).

must be unbundled and which equipment must be collocated. The matter is not determined by an ILEC's internal documents.[68]

I. THE INTEGRATED NATURE OF THE PRONTO PACKET SWITCHING EQUIPMENT PRECLUDES "UNBUNDLING" OF INDIVIDUAL COMPONENTS.

As noted throughout this brief and in the record, the components of the Project Pronto DSL network are interdependent and each needs the others in order to function.[69] They therefore are not capable of being unbundled from one another such that a CLEC could access any individual element at a physical point (as required by 47 C.F.R. 51.307(a)) or "separate from . . . other network elements" (as required by 47 C.F.R. 51.307(d)) and still have the element provide the same functionality. One could place whatever label one wants on the alleged "individual" elements that make up Project Pronto, but no such item could actually be provided separately from all the others. Of course, once that fact is established, the logic of the Broadband Service becomes clear, as it already offers the same end-to-end service, at TELRIC-based rates, that the CLEC would have to obtain if it tried to lease any one of the Project Pronto "UNEs."

J. COPPER SUBLOOPS ARE NOT ACCESSIBLE AT THE NGDLC.

The Order requires unbundling of various copper subloops: from the RT to the NID; from the RT to the SAI; and from the SAI to the NID. The last of these is already required under current FCC rules and thus is not worth debating here, except to note that there is no need for the Commission to duplicate the FCC's rules. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 39-40. The other two copper subloops are not technically feasible because they lack an accessible point at the RT. As explained above, copper subloops terminate on the NGDLC backplane wiring via a "hard-wired"

[68] For example, if all SBC documents had always used the term "Broadband Service," would Rhythyms concede that neither the service nor any part of it could ever be a UNE? If SBC documents never considered the possibility of third parties owning line cards, would that legally foreclose the CLECs' collocation argument?

[69] Am. Ill. Rhg. Ex. 4.0 (Boyer) at 21-22; Am. Ill. Rhg. Ex. 4.1 (Boyer) at 37.

configuration; there is no access point at the Pronto RT. *Ibid.* The CLECs dispute whether hard-wiring was the right engineering choice to make, but none seriously claims that there is an accessible point to copper subloops within a Project Pronto NGDLC.

With regard to engineering choices, the CLECs claim that Ameritech Illinois could have placed a cross-connect field within each Project Pronto RT to allow access to copper subloops at the RT and mitigate some of the stranded capacity problems caused by line card "collocation" (discussed below). This second-guessing is both misplaced and irrelevant. To the extent Ameritech Illinois would use hard-wiring rather than a separate cross-connect field in each RT, it would be acting in accordance with standard past practice and gaining both economic and network benefits, such as fewer points of failure, and better flow-through of service orders, and a cost benefit of only sending field technicians to one location instead of 2. Hardwiring also was the logical economic choice given the expense of placing large cross-connect fields in every RT. Reducing costs is important to the success of Pronto DSL deployment, as the broadband market is very price-competitive already and a higher cost structure would make it difficult to match the prices of cable modem service providers.[70] More fundamentally, the CLECs have no right to determine precisely how Ameritech Illinois deploys new equipment. CLECs may be entitled to access to parts of an ILEC's network *after* it is in place (if all legal prerequisites are met), but they are not entitled to design the new deployment for the ILEC to meet the CLEC's business plan of the moment. [71]

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[70] Am. Ill. Rhg. Ex. 6.0 (Welch) at 13-14; Am. Ill. Rhg. Ex. 6.1 (Welch) at 5-6.

[71] The CLECs have tried to argue that SBC should have installed cross-connect fields within each Project Pronto RT instead of hard-wiring facilities between SAI and RT. As described above, the hard-wiring engineering choice, is consistent with past practice and eliminates a potential point of failure in the network, maximizes the flow-through of service orders, decreases the complexity of inventory of outside plant, and avoids the significant costs of deploying cross-connect facilities in every RT. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 41; Am. Ill. Rhg. Ex. 6.0 (Welch) at 13. ***Confidential Information Omitted***

K. "UNBUNDLING" PVPS AND PVCS WOULD CAUSE SERIOUS CAPACITY PROBLEMS.

The Order defines Permanent Virtual Paths ("PVPs") and Permanent Virtual Circuits ("PVCs") as UNEs. PVPs and PVCs are virtual circuits that transmit data over the physical OC-3c fiber between the RT site and the serving central office. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 33. Currently one PVP is dedicated to each DSL-capable channel bank assembly in an RT. There can be many PVCs within a PVP: a PVP is like a multi-lane highway and PVCs are like various lanes in that highway. *Ibid.*

Ameritech Illinois' witnesses explained how the Order's requirement that Ameritech Illinois provision PVPs to CLECs as "UNEs" would endanger the capacity of the Pronto DSL system and lead to increased costs through stranded capacity. *Id*. at 43-45; Am. Ill. Rhg. Ex. 10.0 (Keown) at 12-14. This would occur because a CLEC leasing a PVP would commandeer for itself *all* of the capacity of that PVP's assigned channel bank assembly. Because there are only three DSL-capable CBAs in a typical Pronto DSL remote terminal arrangement, a CLEC leasing a PVP would instantly monopolize one-third of the DSL capacity of that RT. Am. Ill. Rhg. Ex. 10.0 (Keown) at 12-14. The CLECs do not challenge this showing or the risks of stranded capacity. Instead, as in every case of current infeasibility, they point to possible future events. In the case of PVPs, they point to Alcatel's expected release of software release 11 for Alcatel's Litespan NGDLC equipment. Assuming that software release 11 is successfully developed, tested, and deployed, it may allow for multiple PVPs per CBA. Software release 11, however, has not yet been released, tested or deployed, and at this point Ameritech Illinois does not know how multiple PVPs per CBA would work.[72]

[72] Am. Ill. Rhg. Ex. 10.1 (Keown) at 5 and Sch. JEK-R1 and JEK-R4; Rhg. Tr. 1414 (Watson); Rhg. Tr. 1240 (Dunbar).

This possibility, moreover, would not solve the stranded capacity problem at all. Even if multiple PVPs per channel bank were available, there is no way Ameritech Illinois could ensure that the CLEC was sticking to its allotted bandwidth. Am. Ill. Rhg. Ex. 10.1 (Keown) at Sch. JEK-R4. To use the highway analogy again, a CLEC that leased one lane for its own use is supposed to stay in its lane, but even with software release 11 there would be no way for Ameritech Illinois to control and monitor each and every CLEC's use of PVPs within their allotted bandwidth.[73] The available bandwidth from a channel bank assembly is determined by the NGDLC electronics and would not change with the availability of multiple PVPs per CBA. Thus, CLEC use or abuse of the allocated bandwidth could be a problem no matter how many PVPs are available, as misuse of any PVP could consume excessive bandwidth and degrade service quality and availability for other customers.

The CLECs allege that there are other ways to increase the bandwidth in the Pronto DSL architecture to avoid capacity problems. For example, they state that the channel bank assemblies in an NGDLC could be "unchained" to allow each to use a separate fiber transport facility to the central office, that "outboard" wave division multiplexing ("WDM") could be

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[73] Tr. 1992-93 (Keown); Am. Ill. Rhg. Ex. 10.1 (Keown) at Sch. JEK-R4. Dr. Ransom made the point even more clearly on cross-examination by Rhythms' counsel in California this week:

> Q. What about the PVPs? Can the element manager set the PVPs to be allowed to have up to but not over a certain level of throughput?
>
> A. No. That is not – even though with Release 11 we will have more PVPs, we don't have – it is a very limited capability, and in particular does not have the ability to manage the total bandwidth of the PVP.
>
> * * *
>
> Q. So in other words we can't manage our little pipes within a big pipe right now?
>
> A. Not with the capabilities now and not with Release 11 either.

Rulemaking 93-04-003 and Investigation 93-04-002 (Permanent Line Sharing Phase) (Cal. P.U.C.), Transcipt of August 1, 2001, at 13147, 13151 (Attachment C hereto).

purchased and installed for a similar effect, or that Ameritech Illinois could use Litespan 2012 systems to replace Lifespan 2000 systems.[74] But as Ameritech Illinois' witnesses explained, these alternatives do not solve the capacity problem. All of the CLECs' alternative scenarios create a need for more ports on the OCD in the central office to receive the incoming traffic. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 16-18. All OCDs have a limited number of ports, many of which would be occupied even in the Pronto DSL architecture as planned. The CLECs' alternative engineering scenarios would lead to immediate or at least near-term exhaust of all of the ports on the OCD, requiring Ameritech Illinois to install one or more additional OCDs. *Id*. at 13, 17. OCDs are expensive (Am. Ill. Rhg. Ex. 10.0P (Keown) at 5) and adding new ones in multiple central offices would be a substantial cost. And as with all of the extra expense caused by the CLECs' requests, those expenses would simply make the DSL services using those facilities less competitive – or noncompetitive – with other advanced services. And, of course, there is no guarantee the CLECs would use the extra facilities – which are *not* necessary for the primary use for which the Pronto DSL network was designed, *i.e.*, high-speed Internet access for the mass market – meaning that Ameritech Illinois would again bear the risk of not recovering the extra costs.

Furthermore, the CLEC proposals relate only to increasing fiber capacity between the RT and the OCD, but that does nothing to increase the *bandwidth* available on the fiber, which is the real problem. Bandwidth is determined by the electronics on either end of the fiber as well as the fiber itself. Am. Ill. Rhg. Ex. 4.1 (Boyer) at 8. If the electronics are not changed – at great cost – the bandwidth for any individual channel bank will remain at an OC-3c level, and allowing CLECs to consume that bandwidth with "unbundled" PVCs or PVPs would quickly cause

[74] *E.g.*, Sprint Rhg. Ex. 5.0 (Dunbar) at 23; Rhythms Rhg. Ex. 1.0 (Watson) at 7.

bandwidth exhaust problems, as explained in Ameritech Illinois Application for Rehearing (at 60-63, incorporated by reference). *See also* Am. Ill. Rhg. Ex. 4.0 (Boyer) at 36.

In addition, there is no physical point of access to a PVP or a PVC. In fact, PVCs ride the entire circuit from the OCD to the customer's premises, they do not stop or end at the NGDLC. Rhg. Tr. 575 (Ireland). Even Sprint witness Dunbar admitted that there was no way to access a PVP or PVC "unbundled" from the attached electronics on either end (Rhg. Tr. 1234-35, 1271), even though the FCC's rules plainly require that a UNE be capable of being accessed on an "unbundled" basis. 47 C.F.R. 51.307(d).

L. A PORT ON THE OCD CANNOT BE UNBUNDLED.

Unbundling of ports on an OCD is not technically feasible because doing so would lead to capacity problems by prematurely exhausting the ports on the OCD. OCDs are port-limited devices and "unbundling" ports on the OCD is just too risky in terms of the substantial cost of adding new OCDs prematurely. The CLECs claim that there are multiple ways to increase the bandwidth capacity of an NGDLC system to support various types of DSL service. The problem with all of these theories is that even if one took steps to free up traffic throughout constraints at the RT, the parts on the OCD would still exhaust sooner than ever, as discussed above. Am. Ill. Rhg. Ex. 4.0 (Boyer) at 42-44. Also, because the OCD is part of the integrated packet switching functionality of the Pronto DSL facilities, it too cannot actually be unbundled from the other packet switching equipment.

M. LINE CARD "COLLOCATION" IS NOT FEASIBLE.

Ameritech Illinois' Application for Rehearing and direct testimony on rehearing addressed three technical problems with CLEC line card "collocation": ADLU cards not licensed by Alcatel would not work in Alcatel equipment deployed by Ameritech Illinois; allowing such "collocation" would lead to premature exhaust of line card slots and inefficient use

of the Pronto architecture; and such "collocation" would require extensive and expensive changes to Ameritech Illinois' systems and processes. Once again, the CLECs either ignore these problems or acknowledge that they exist but dismiss them because they might possibly be reduced by unspecified future Alcatel equipment or software upgrades. (As noted above, the CLECs concede that they could never "collocate" incompatible line cards in the Alcatel equipment. That concession at a minimum would require a substantial change to the Order.)

The CLECs also assert, without any evidence, that Ameritech Illinois somehow already has all of the OSS interfaces and provisioning, maintenance and repair, inventorying, and other systems necessary to successfully enable line card "collocation." *E.g.*, Covad Rhg. Ex. 2.0 (Gindlesberger) at 4-5, 22-25. This claim is ludicrous and has absolutely no support. Mr. Waken and Mr. Hamilton describe the extensive system changes Ameritech Illinois would have to make to accept, store, inventory, install, and return a CLEC line card. Am. Ill. Rhg. Ex. 5.0 (Hamilton) at 3-20; Am. Ill. Rhg. Ex. 13.0 (Waken) at 29-33.

Regarding the capacity problems of line card "collocation," Ameritech Illinois witness Keown explained how the "collocation" of CLEC-owned line cards could cause severe inefficient use of the DSL capacity in a RT, leading to stranded capacity and substantial increased costs for Ameritech Illinois. Am. Ill. Rhg. Ex. 10.0 (Keown) at 14-16. The CLECs attempt to deny the problem by saying they would not use line card "collocation" in that way, but of course there is no guarantee of that. The CLECs also claim that they never contemplated that every "collocated" line card would belong to a single CLEC, but it is difficult to see how the Order – which is based on CLEC requests in the earlier stage of this case – could be read any other way. Moreover, all of the CLECs' new compromise positions on this issue reveal that they really care nothing about actually "collocating" or owning complete line cards, but rather just

want a port on a card and the ability to use new types of cards as they become available. Those issues are already fully addressed in the *Project Pronto Order*.

N. FUTURE FEATURES AND FUNCTIONS CAN BE DEALT WITH IN THE NATIONAL COLLABORATIVE.

One fact that has emerged on rehearing is that the CLECs, contrary to all of their prior claims, are not very interested in using the Project Pronto architecture as it was planned for deployment. Instead, they either want to dictate how Ameritech Illinois should engineer its own network investment at the outset or require that any and all future capabilities be deployed regardless of whether their deployment makes economic sense or of their impact on network operations and other services.[75]

The legal problems with demanding that Ameritech Illinois build new facilities or a superior quality network just for CLECs are discussed above. The issue of deploying future features and functions, however, requires some comment. Ameritech Illinois is not opposed to deploying new features and functions in the Pronto DSL architecture as they are developed by manufacturers of the deployed facilities. In some cases, however, even new features and functions that a manufacturer says will work with its equipment might not make economic sense – especially in a competitive market like the advanced services market – or might cause problems in the network that was actually deployed (by, for example, consuming large amounts of bandwidth and adversely affecting the quality of other services or system capacity). The FCC recognized such potential problems in the *Project Pronto Order*, which is why it set up the

[75] The CLECs try to support their claim by arguing that network development is more like a movie than a snapshot. Even if that were true, the movie here has not even started, so the CLECs are asking the Commission to speculate about future events. In making any movie a lot of film ends up on the cutting room floor. So it is here: As numerous Ameritech Illinois witnesses explained, many business plans and research and development projects prove to be unworkable in the real world, and evidence that an option was considered at one time does not in any way prove it was viable, realistic, or a good idea. *See, e.g.*, Am. Ill. Rhg. Ex. 1.1 (Ireland) at 10. Thus, the tool the CLECs want the Commission to use is not a movie projector, but a crystal ball.

collaborative process to deal with new features and functions. *Project Pronto Order*, ¶ 44 and App. A at 37, 42. By attempting to make deployment of every new feature and function mandatory, the CLECs seek to render the FCC's judgment meaningless and force actions that could have adverse economic and network impacts. This, of course, is consistent with the CLECs' behavior throughout this case, which is to seek to impose requirements on Ameritech Illinois that they know cause serious technical concerns, then ask the Commission and Ameritech Illinois to trust them not to abuse such requirements. That approach is not rational. The FCC's approach, by contrast, allows for discussion of technical issues first, and then gives the CLECs a wide range of enforcement alternatives. *Project Pronto Order*, ¶ 44.

V. THERE IS NO LEGAL OR FACTUAL BASIS FOR ALLOWING CLECS DIRECT ACCESS TO AMERITECH ILLINOIS' BACK OFFICE SYSTEMS.[76]

The CLECs attempt to turn the direct access issue into a debate about whether Ameritech Illinois' back office systems are OSS, and the CLECs spend a considerable amount of time trying to prove that Ameritech Illinois' back office systems are OSS. The CLECs' argument is a red herring. The distinction between the two is entirely irrelevant to the Commission's analysis of this issue. Indeed, even if Ameritech Illinois' back office systems are considered OSS, that says nothing about whether access to those systems should be provided through direct, unmediated access or via gateways. In fact, the FCC has endorsed the use of gateways as the

[76] The FCC explicitly "urge[d] requesting carriers and incumbent LECs to engage in a collaborative process at the regional level to develop solutions" to OSS functionality issues with respect to provisioning of the HFPL UNE. *Line Sharing Order*, ¶ 128. The FCC expected such issues to be resolved when "incumbent and competitive LECs collaborate to establish OSS interfaces, regularized processes, and business practices for ordering, provisioning, billing, testing, maintenance, and repair responsibilities." *Ibid.* Allowing CLECs direct access to Ameritech Illinois' back office systems serves only to interfere with those collaborative efforts and risks conflict with the outcome of that process. Under these circumstances, this Commission should allow the remaining OSS issues (including the limited issue of direct access to back office systems) to be addressed and resolved in the continuing collaboratives, as urged by the FCC.

vehicle by which CLECs should access information in an ILEC's systems.[77] Despite the CLECs' attempt to cloud the real issue, what the Commission must decide here is what *type of access* the CLECs should be given to Ameritech Illinois' systems—direct, unmediated access or gateway access. From both a legal and policy perspective, the answer to this question is clear—CLECs should receive *only* gateway access, *not* direct, unmediated access, to Ameritech Illinois' systems. This is precisely what two Illinois Hearing Examiners already have found in their proposed decision on rehearing in Docket No. 00-0592,[78] and what two Texas arbitrators recently found in a Texas arbitration between SWBT and many of the same CLECs that are parties to this case.[79]

As explained further below, the FCC has never ordered direct access to back office systems and, although the CLECs may argue that this Commission is free to adopt requirements beyond those ordered by the FCC, the Commission should refrain from doing so. Indeed, permitting direct access to Ameritech Illinois' back office systems would be bad policy, because direct access potentially enables CLECs to obtain confidential, commercially sensitive information that could be used for improper purposes. Direct access to Ameritech Illinois' back office systems also could slow down the processing of *all* service orders or possibly cause complete failure of the systems. Aside from these problems, direct access is unnecessary. There simply is no evidence that Ameritech Illinois is not already providing CLECs with all the loop

[77] Am. Ill. Ex. 2.1 (Jacobson) at 8-9. Significantly, the FCC has determined that electronic interfaces would likely decrease disputes between CLECs and ILECs. *Line Sharing Order*, ¶128 ("We recognize that unless incumbent and competitive LECs collaborate to establish OSS interfaces, regularized processes, and business practices for ordering, provisioning, billing, testing, maintenance, and repair responsibilities, disputes among incumbent and competitive LECs sharing the same local loops are likely to arise.").

[78] Administrative Law Judges' Proposed Order on Rehearing, *Joint Submission of Amended Plan of Record for Operations Support Systems ("OSS")*, Docket No. 00-0592, at 12 (July 3, 2001) ("*00-0592 Rehearing HEPO*").

[79] Arbitration Award, *Petition of IP Comms. Corp. to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168, at 121-125 (TX Pub. Util. Comm. July 13, 2001) ("*Texas Arbitration Award*").

qualification *information* in its systems, which, as the 00-0592 Rehearing HEPO and the Texas Arbitration Award correctly conclude, is all that the governing federal law requires. In fact, despite conducting an audit of Ameritech Illinois' back office systems, the CLECs have not identified any specific piece of loop qualification information that they need to provision service and that they are not already receiving from Ameritech Illinois. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 46.

Perhaps more importantly, even if the CLECs or a regulatory agency actually did identify a legitimate piece of loop qualification information that CLECs need to provision service that they are not already receiving from Ameritech Illinois, the solution is *not* to permit CLECs direct access to Ameritech Illinois' back office systems in order to obtain that information. Rather, that information should be provided to CLECs through Ameritech Illinois' electronic interfaces, gateways and GUIs, just as all loop qualification information is provided today. In fact, as Ameritech Illinois represented throughout this proceeding, if the CLECs demonstrate that the loop qualification information provided through Ameritech Illinois' gateways needs to be supplemented, Ameritech Illinois would go through the Change Management Process and modify its OSS interfaces, gateways and GUIs in order to accommodate the CLECs' legitimate need for additional loop qualification information. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 46. The CLECs, of course, have not made such a showing.[80]

The bottom line is that there is no legitimate reason and, in fact, it would be unwise, to permit CLECs direct access to Ameritech Illinois' back office systems in order to obtain loop qualification information. The Illinois Hearing Examiners, in their Proposed Order on Rehearing in Docket No. 00-0592, and the Texas Arbitrators, in their Arbitration Award in Docket No.

[80] Rhg. Tr. 2562 (Waken).

22168, got it right when they rejected CLEC proposals for direct access to Ameritech Illinois' and SWBT's back office systems, respectively. There is no conceivable reason to reach a different conclusion here.

O. THE FCC HAS NEVER ORDERED ILECS TO PROVIDE CLECS WITH DIRECT ACCESS TO THEIR BACK OFFICE SYSTEMS.

The plain language of the *UNE Remand Order* provides that CLECs are entitled to access *only* certain types of *information* in an incumbent's systems and *only* via *electronic gateways*—not direct access to those systems. Specifically, the FCC has consistently limited CLEC access to the *information* in an ILEC's systems, and then only to the extent such information exists.[81] As the FCC made clear in several places of the *UNE Remand Order*,

> the pre-ordering function includes access to loop qualification *information*. Loop qualification *information* identifies the physical attributes of the loop plant . . . .
>
> * * *
>
> [t]he incumbent LEC must provide access to the underlying *loop qualification information* contained in its engineering records, plant records, and other back office systems . . . .
>
> * * *
>
> the relevant inquiry is . . . whether such *information* exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel.

UNE Remand Order, ¶¶ 426, 428, 430-431 (emphasis added).

It is even more clear that the FCC has not ordered direct access to back office systems because, in the *First Report and Order* (¶ 527), *UNE Remand Order* (¶ 429) and *Line Sharing Order* (¶ 107), the FCC specifically stated that ILECs are required to provide access to OSS information *via an electronic interface* (in other words, through gateways), not direct access:

[81] Am. Ill. Ex. 2.0 (Jacobson) at 7-8; Ex. 2.1 (Jacobson) at 8-9.

> [i]deally, each incumbent LEC would provide access to support systems *through a nationally standardized gateway*. [*First Report and Order*, ¶ 527.]
>
> * * *
>
> [t]o the extent that ILEC employees have access to the information in an electronic format, that same format should be made available to new entrants *via an electronic interface*. [*UNE Remand Order*, ¶ 429.]
>
> * * *
>
> [w]e expect that the incumbent LECs will work with competitive LECs on an ongoing basis to design, implement, and maintain efficient and effective OSS *interfaces* that will support ongoing line sharing requirements. [*Line Sharing Order*, ¶ 107.]

Contrary to the CLECs' claim, the FCC supports the use of electronic interfaces as the method by which CLECs access OSS information, *not* direct access to the ILEC's back office systems themselves.[82] In fact, the FCC approved these gateways as part of SWBT's 271 applications in Texas, Kansas, and Oklahoma.[83]

It therefore is not surprising that Rhythms' witness, Mr. Ayala, was unable to point to anything in the *UNE Remand Order* to support Rhythms' request for direct access to Ameritech Illinois' back office systems. Indeed, Mr. Ayala was unable to point to any requirement in the *UNE Remand Order* that ILECs permit "access to back office systems," "direct access to back office systems," or "unmediated access to back office systems," because there is no such requirement. Rhg. Tr. 1373 (Ayala). The only so-called support for its position that Rhythms tries to draw from the *UNE Remand Order* is vague language suggesting that Ameritech Illinois' back office systems are OSS. As stated above, the debate over whether Ameritech Illinois' back office systems are OSS is totally irrelevant to the issue of direct access. When it comes to the

[82] Am. Ill. Ex. 2.1 (Jacobson) at 8-9; Am. Ill. Rhg. Ex. 13.1 (Waken) at 3.

[83] *Texas 271 Order*, ¶¶ 99, 147 (pre-ordering), ¶ 169 (ordering), ¶ 194 (provisioning), ¶ 120 (maintenance and repair), ¶ 210 (billing).

type of access CLECs should be given to Ameritech Illinois' systems, the *UNE Remand Order* is abundantly clear that ILECs are only required to provide CLECs with *information* in their systems via *electronic interfaces*—not direct, unmediated access to the systems themselves.

Indeed, this is exactly what the Illinois Hearing Examiners' Proposed Order on Rehearing in Docket No. 00-0592 and the Texas Arbitrators' Award in Docket No. 22168 already have concluded. The Illinois Hearing Examiners in Docket No. 00-0592 recognized the distinction between access to information contained in back office systems and direct access to the back office systems themselves, and found that CLECs have no legal right to directly access Ameritech Illinois' back office systems:

> Turning once again to the *UNE Remand Order*, and reviewing the FCC's directives we see no language therein to support an entitlement of unmitigated direct access to back office systems. We remain convinced that our interpretation of the *UNE Remand Order*, the controlling federal authority in this issue, is solid. Indeed, both Staff and Ameritech read the federal law in the same way consistent with the plain language construct. Notably Covad does not, and indeed cannot, challenge any particulars of our construction of the federal law or the premise we derive therefrom, i.e., that the access to which CLECs are entitled is access to the *information* and not, as Covad would have it, direct access to the back office systems themselves.[84]

Similarly, the Texas Arbitrators found that

> it would be impractical for SWBT to allow CLEC personnel physical access to SWBT's offices in order to access the databases via the same terminals ILEC employees use. Rather, access should be provided remotely through a gateway system. The FCC has made consistent endorsement that the CLECs should use gateways to access incumbent's backend systems."[85]

The analysis of the *UNE Remand Order* performed by the Hearing Examiners in Docket No. 00-0592 and the Texas Arbitrators in Docket No. 22168 is accurate, and there is no basis for the Commission to adopt a conflicting position here. The plain language of the *UNE Remand Order*

[84] *00-0592 Rehearing HEPO* at 12.

[85] *Texas Arbitration Award* at 121-25.

provides that CLECs are entitled to access *only* certain types of *information* in Ameritech Illinois' back office systems and *only* via *electronic gateways*—not direct, unmediated access to the systems themselves.[86]

In short, while the FCC certainly has had the opportunity to order ILECs to permit CLECs direct, unmediated access to their back office systems, it has chosen not to do so.[87] Indeed, when confronted with the issue of CLEC access to OSS information, the FCC has never mentioned giving CLECs direct access to an ILEC's back office systems or databases. To the contrary, the FCC's statements in the *First Report and Order, UNE Remand Order, Line Sharing Order* and *SBC/Ameritech Merger Order* could not be more clear that the ILEC's obligation is to provide *information* necessary to support OSS functions, and that *electronic interfaces* are the method by which CLECs are to obtain such information from an ILEC's systems. Ameritech Illinois indisputably has made the information necessary to support OSS functions available through its gateways.[88] The CLECs' proposal that the Commission allow direct access to Ameritech Illinois' back office systems goes well beyond, and conflicts with, the OSS requirements imposed by the FCC.

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[86] It should be noted that the conditions to the SBC/Ameritech merger that were adopted by the FCC and the Illinois Commerce Commission also suggest that Ameritech Illinois is not required to provide direct access to its back office systems but, rather, CLECs are to be given access to information via electronic interfaces, gateways and GUIs. For example, the FCC's Condition 15(c) to the SBC/Ameritech merger simply requires SBC to develop and deploy enhancements to its existing Datagate EDI interfaces to facilitate pre-ordering and ordering of network elements used to provide xDSL and other advanced services. *SBC/Ameritech Merger Order,* App. C. at 25. FCC Merger Conditions 19 and 20 only require SBC to provide unaffiliated carriers nondiscriminatory access to the same loop qualification *information* that is available to SBC's retail operations, including SBC's advanced services affiliate. *Id.,* App. C at 30-31. Additionally, Illinois Merger Condition 29 requires Ameritech Illinois to deploy application-to-application interfaces and GUIs "for OSS that support pre-ordering, ordering, provisioning, maintenance and repair, and billing for resold services, individual UNEs, and combination of UNEs." *ICC Merger Order* 253-54. Ameritech Illinois complies with all these merger conditions by providing CLECs with loop information via its many electronic interfaces, gateways and GUIs. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 5-6, 50-52.

[87] Am. Ill. Ex. 2.0 (Jacobson) at 7-8; Ex. 2.1 (Jacobson) at 8-9.

[88] Am. Ill. Ex. 2.0 (Jacobson) at 8; Ex. 2.1 (Jacobson) at 9, 20; Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 5-6, 50-52.

P. DIRECT ACCESS ENABLES CLECS TO OBTAIN INFORMATION TO WHICH THEY ARE NOT LEGALLY ENTITLED.

The *UNE Remand Order* provides that CLECs are entitled to access only certain types of *information* in an incumbent's systems. Specifically, CLECs are entitled to any pre-ordering (loop qualification) information available to any Ameritech Illinois employee, and any ordering, provisioning, maintenance and repair, and billing information that is available to Ameritech Illinois' retail arm. The record establishes that Ameritech Illinois' gateways already provide this information to CLECs. In fact, the CLECs have audited Ameritech Illinois' back office systems and have not identified any information in those systems necessary to these OSS functions that they are not already receiving from Ameritech Illinois. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 46.

Unfettered direct access to Ameritech Illinois' back office systems would enable CLECs to obtain information beyond that which they are legally entitled to access under the *UNE Remand Order.* Indeed, with such direct access, CLECs potentially could obtain every piece of information in numerous back office systems, even though that information is unrelated to the five OSS functions and, in many instances, is confidential to end-users, other CLECs and Ameritech Illinois. Simply put, much of the information that CLECs potentially could obtain via direct access bears no relationship to the CLECs' ability to provision service over the HFPL UNE or xDSL capable copper loops, and is not needed for CLECs to make an independent judgment about whether the copper loop or the HFPL of the copper loop is capable of supporting the advanced services equipment that the requesting carrier intends to install. Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10. The FCC has never ordered ILECs to provide CLECs with information unrelated to the five OSS functions, and certainly did not contemplate the CLECs should have access to every piece of information in an incumbent's databases, as the Order's direct access requirement apparently would do.

Putting aside the law, from a policy perspective, disclosure of the confidential information in Ameritech Illinois' back office systems would not only pose a security risk to end-users, it would allow CLECs to use that information unlawfully for marketing or other improper purposes.[89] Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10. In their Proposed Order on Rehearing in Docket 00-0592, in which they deny the CLECs' request for direct access, the Hearing Examiners found these confidentiality and security concerns to be "grave matters." Yet the CLECs largely ignore these concerns, making the hollow and irrelevant claim that they "are not seeking access to such information." Rhythms Rhg. Ex. 1.0 (Ayala) at 7. That claim is both disingenuous and beside the point. As explained below, the Order would allow CLECs to obtain direct access to numerous back office systems that contain *no* information whatsoever related to loop qualification or to the five OSS functions, and much of that information is confidential to end-users, other CLECs and Ameritech Illinois. If CLECs truly are seeking access only to loop information necessary to provision DSL service, there would be no reason for them to have direct access to back office systems that do not contain such information, or to any back office systems at all. Am. Ill. Rhg. Ex. 13.1 (Waken) at 9-10. The fact that the CLECs continue to seek direct access to such back office systems suggests that the CLECs truly seek information to which they are not legally entitled, and that could be used for improper purposes. Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10.

[89] It is for these very reasons that Ameritech Illinois has strict guidelines that prohibit retail representatives from directly accessing Ameritech Illinois' back office systems and that permit only select employees to access only those systems necessary to perform their specific job functions. Am. Ill. Rhg. Ex. 13.0 (Waken) at 7-8. In fact, retail sales representatives utilize the same or comparable OSS interfaces as customer CLECs. In short, these employees cannot access any information other than that provided over the OSS interfaces and therefore are at parity with CLECs. Am. Ill. Rhg. Ex. 13.0 (Waken) at 8.

Significantly, in their Proposed Order on Rehearing in Docket No. 00-0592, one of the reasons why the Hearing Examiners rejected the CLECs' direct access proposal was because it would enable CLECs to obtain information that they were not legally entitled to access, and that they had not established a legitimate need to access:

> To be sure, Covad has not stopped to define or illustrate the particulars of its proposal. We perceive the back office systems themselves to contain a multitude of information and data much of which the CLECs are not entitled to access. Staff maintains, and we agree, that CLECs are not entitled to every piece of information in an ILEC's records or databases.
>
> Neither before nor now, do the Applicants attempt to answer the many questions and concerns raised by their direct access proposal. As we see it, and the only way we can view the situation, Covad wants "something more" than the information to which it is entitled. Covad, however, has not defined this something more nor substantiated any validity for its reach.

00-0592 Rehearing HEPO at 12. The same is true here. There is no reason to deviate from the Hearing Examiners' Proposed Decision on Rehearing in Docket 00-0592, because the CLECs have not presented any more evidence in this case than they did in the Rehearing of Docket 00-0592 regarding the CLECs' alleged need for direct access to Ameritech Illinois' back office systems, or Ameritech Illinois' alleged failure to provide all loop qualification information.

1. DIRECT ACCESS ENABLES CLECS TO OBTAIN ORDERING, PROVISIONING, REPAIR AND MAINTENANCE, AND BILLING INFORMATION THAT IS NOT AVAILABLE TO AMERITECH ILLINOIS' RETAIL ARM.

Generally, under the *First Report and Order*, Ameritech Illinois only must provide access to *information* related to the five OSS functions that is available to Ameritech Illinois' *retail operations*:

> We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems the incumbent

> employs *in performing the above functions for its own customers. For example to the extent that customer service representatives of the incumbent have access . . . the incumbent must provide the same access to competing providers.*

First Report and Order, ¶ 523 (emphasis added).

There is only one circumstance in which Ameritech Illinois must provide CLECs with access to *information* for an OSS function that goes beyond the *information* available to Ameritech Illinois' retail operations. That one circumstance is set forth in paragraph 430 of the *UNE Remand Order*:

> We also clarify that under our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel. Denying competitors access to such *information*, where the incumbent (or an affiliate, if one exists) is able to obtain the relevant *information* for itself, will impede the efficient deployment of advanced services. To permit an incumbent LEC to preclude requesting carriers from obtaining information about the underlying capabilities of the loop plant in the same manner as the incumbent LEC's personnel would be contrary to the goals of the Act to promote innovation and deployment of new technologies by multiple parties.

(Emphasis added.) Paragraph 430 is written in the context of "loop qualification," that is, the process by which a CLEC seeks and receives information on the physical attributes of a loop as part of the pre-ordering function. Accordingly, under this exception, access to pre-ordering *information* must be provided in the same manner as is available to *any of the incumbent's personnel—not just Ameritech Illinois' retail personnel*. Stated another way, to the extent pre-ordering *information* is accessible anywhere within the incumbent's back office systems in an electronic form, the ILEC must provide it in an electronic form to a CLEC.[90]

[90] Am. Ill. Ex. 2.1 (Jacobson) at 21-23.

Given that paragraph 430 carves out an exception for the pre-ordering function only, its requirement does not impact other OSS functions, such as ordering, provisioning, repair and maintenance, and billing. Indeed, it is clear that the FCC's exception in paragraph 430 has nothing to do with Ameritech Illinois' general OSS obligations, which the FCC found "unnecessary to modify."[91] The proper standard for ordering, provisioning, repair and maintenance, and billing therefore remains whether Ameritech Illinois' *retail representatives* have access to the information. In other words, CLECs are entitled to access to Ameritech Illinois' *information* related to ordering, provisioning, repair and maintenance, and billing only to the extent that Ameritech Illinois' *retail representatives* have access to the information. The record establishes that there is no difference between the OSS ordering, provisioning, repair and maintenance, and billing information that CLECs currently receive and the information received by Ameritech Illinois employees who use Ameritech Illinois' OSS, or by Ameritech Illinois' affiliate.[92] CLECs are not legally entitled to anything more.[93] Allowing CLECs direct access to Ameritech Illinois' back office systems would enable CLECs to obtain *all* information available to *any* Ameritech Illinois personnel, thereby improperly expanding the requirements of paragraph 430 to include information that is not related to the pre-ordering function, as well as expanding the general requirements of the *UNE Remand Order* to include information unrelated to the five OSS functions. Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10.

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[91] *UNE Remand Order*, ¶ 426.

[92] Tr. 869-71 (Jacobson); Am. Ill. Ex. 2.0 (Jacobson) at 6-8; Ex. 2.1 (Jacobson) at 9, 14, 19-20; Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 50.

[93] Am. Ill. Ex. 2.1 (Jacobson) at 20-23.

In other words, Ameritech Illinois is legally required only to provide CLECs with loop qualification (pre-ordering) *information* available to any Ameritech Illinois employee, and there is no evidence that CLECs are not already receiving that *information*. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 50. Although the CLECs have conducted an audit of Ameritech Illinois' back office systems, the CLECs have not identified any loop qualification information that they need and are not already receiving, why it is needed, or why the CLECs are not able to obtain it via Ameritech Illinois' electronic interfaces, gateways or GUIs. Am. Ill. Rhg. Ex. 9.1 (Mitchell) at 3-4. The CLECs have not identified any such information because there is none. Rather, Ameritech Illinois already provides CLECs with *all* loop qualification information in its systems via its electronic interfaces, gateways and GUIs. Am. Ill. Rhg. Ex. 9.0 (Mitchell) 5-6, 50-52. Simply put, the CLECs' request for loop qualification *information* that is available to *any* Ameritech Illinois employee is not the issue, because CLECs already receive that *information*.

In any event, even if the CLECs could identify a piece of loop qualification information in Ameritech Illinois' back office systems that they are not already receiving, the solution is not to permit those CLECs direct access to Ameritech Illinois' back office systems. As noted above, paragraph 430 does not require an ILEC to provide CLECs with *any* direct access to its back office systems. Rather, under paragraph 429 of the *UNE Remand Order*, Ameritech Illinois is only required to provide access to information *via an electronic interface*, not direct access to the back office systems themselves. Although paragraph 430 adds that CLECs may have access to *pre-ordering* (loop qualification) *information* available to *any ILEC employee*, not just the ILEC's retail representatives, the CLECs still must access that information via an electronic interface.[94] Accordingly, if the CLECs ever were to identify any loop qualification information

[94] *UNE Remand Order*, ¶ 429.

that they are not receiving from Ameritech Illinois, the proper solution would be to require Ameritech Illinois to provide that information via its electronic interfaces, gateways and GUIs. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 46.

2. DIRECT ACCESS ENABLES CLECS TO OBTAIN INFORMATION UNRELATED TO THE FIVE OSS FUNCTIONS—PRE-ORDERING, ORDERING, PROVISIONING, MAINTENANCE AND REPAIR, AND BILLING.

The Order's requirements regarding direct access to Ameritech Illinois' back office systems entirely ignore the fact that, under the FCC's rules, CLECs are legally entitled to access *only* information that relates to the five OSS functions, nothing more.[95] Many of the back office systems for which the Order appears to require such direct access contain information that has nothing to do with pre-ordering, ordering, provisioning, maintenance and repair, and billing,[96] and have nothing to do with the CLECs' ability to utilize the HFPL UNE.[97]

To be more specific, SWITCH is an inventory of Ameritech Illinois' circuits, as well as the circuits used by CLECs; TIRKS ("Trunk Integrated Records Keeping System") is an inventory of trunks; and APTOS[98] (which is not used by Ameritech Illinois, but only by non-

[95] *Id*., ¶ 425; Am. Ill. Ex. 2.0 (Jacobson) at 4-5, 7.

[96] Schedule RLJ-2; Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14, Attachment B; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10. Notably, Ameritech Illinois does not even have many of these back office systems referenced in the order, including: SORD, LASR, and PREMIS. Am. Ill. Rhg. Ex. 13.0 (Waken) at 11.

[97] As explained by Mr. Waken in cross examination, LEAD/LEIS has a copy of the technical loop information that it received from LFAC, but does not add anything to what it received from LFACS. LMOS contains some loop provisioning information, but no loop makeup information. MARCH and PLAN contain no loop information. SOAC only has loop information on a transitory basis. SWITCH/FOMS/FUSA has no loop provisioning information. TIRKS (and WFA/C, which is identical to TIRKS) has special services information from LFACS, but TIRKS is not very reliable. WFA/DI has no technical loop information. WFA/DO only has a copy of information from SOAC, LFAC and SWITCH. Simply put, all technical loop information comes from LFACS and ARES. Rhg. Tr. 2653-55 (Waken).

[98] "Automatic Pricing, Terminal, Options and Services."

Ameritech SBC ILECs) contains pricing information.[99] Clearly, these three systems have nothing to do with the HFPL or the information CLECs need to utilize the HFPL, do not contain any loop qualification, and contain information unrelated to the five OSS functions.[100] As noted above, CLECs simply do not have the legal right to directly access the SWITCH, TIRKS, and APTOS systems themselves. Indeed, they do not even have the legal right to access the *information* maintained in SWITCH, TIRKS and APTOS, to the extent that such information is wholly unrelated to the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions—which is the *only* type of *information* that the FCC requires Ameritech Illinois to provide to CLECs.

Along this same line, some of Ameritech Illinois' back office systems contain both information relevant to the five OSS functions and information that is not relevant to the five OSS functions.[101] For example, PREMIS[102] (which, again, is used only by non-Ameritech SBC ILECs) and ACIS contain address validation and telephone number inquiry functions for the pre-ordering application-to-application interface (EDI) and the GUI interface (Uniform Verigate). PREMIS and ACIS also contain information such as existing or working service at a given location and who provides that service.[103] Although CLECs have the right to obtain the former type of information, CLECs do not have the legal right to obtain the latter type of information,

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[99] Am. Ill. Ex. 2.1 (Jacobson) at 20, 24-25; Schedule RLJ-2; Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14; Am. Ill. Rhg. Ex. 13.1 (Waken) at 5-10.

[100] Am. Ill. Ex. 2.1 (Jacobson) at 12-13, 24; Schedule RLJ-2; Am. Ill. Rhg. Ex. 13.0 (Waken) at 10-14; Attachment B.

[101] The proprietary nature of information in Ameritech Illinois' back office systems will be discussed in greater detail below.

[102] "Premises Information System."

[103] Am. Ill. Ex. 2.1 (Jacobson) at 13; Schedule RLJ-2; Am. Ill. Rhg. Ex. 13.0 (Waken) at 10-11.

because it is wholly unrelated to pre-ordering, ordering, provisioning, maintenance and repair, and billing. Nevertheless, the Order's direct access requirement potentially would enable CLECs to obtain all the information in ACIS and other back office systems that contain information unrelated to the five OSS functions, including valuable, commercially sensitive information about other CLECs, as explained further below.

3. DIRECT ACCESS ENABLES CLECS TO OBTAIN CONFIDENTIAL INFORMATION OF END-USERS, OTHER CLECS AND AMERITECH ILLINOIS.

In addition to allowing CLECs to access information that is wholly unrelated to pre-ordering, ordering, provisioning, maintenance and repair, and billing, the Order's direct access requirement would allow CLECs to access information that is confidential to end-users, to other CLECs and to Ameritech Illinois. The undisputed record establishes that back-office databases contain high security information, including:

(1) Fiber and cable deployment (routes of cable to airlines, airports, police stations, fire stations, hospitals, and government agencies);

(2) Access to unlisted telephone numbers;

(3) Technician dispatch for Special Services;

(4) Security alarm information;

(5) Inventory of trunks and circuits of all CLECs;

(6) Ameritech Illinois employee management information;

(7) All open service orders for retail customers, all special services customers (*i.e.*, burglar alarm, PBX trunks, local transport services), interexchange carrier circuits and CLEC services for all of Ameritech Illinois' wholesale and retail customers; and

(8) Information about an end user's local service and who provides long distance service.

Am. Ill. Ex. 2.1 (Jacobson) at 11-12; Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14. At worst, allowing CLECs direct access to Ameritech Illinois' back office systems containing such confidential and

proprietary information would risk the safety and security of end-users and the network itself. At best, a direct access requirement would allow CLECs to obtain competitively sensitive information for marketing or other improper purposes, in violation of Section 222(b) of the Act. Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14.

More specifically, direct access to Loop Facility Assignment and Control System ("LFACS") and Loop Maintenance and Operations System ("LMOS") potentially enables CLECs to obtain highly confidential information about end users, and the disclosure of such information could threaten the security and safety of end users.[104] For example, with direct access to LFACs, CLECs would be able to view the pending service orders of all CLECs as well as Ameritech Illinois' retail and wholesale service orders. Each service order contains the following: Directory Listing Information, Service and Equipment Information, Billing Information, and Service Order Remarks Information. These sections, in turn, include the following types of information: customer name and address, customer telephone number (regardless of whether it is published or non-published), additional customer services, customer credit information, cable and pair assignments, customer-provided special premises access information that was made available to enable the work to be performed,[105] and Can Be Reached ("CBR") telephone numbers.[106] Clearly, allowing direct access to back office systems where

[104] With direct access to Ameritech Illinois' back office systems, CLECs also could view internal management information of Ameritech Illinois. For example, CLECs could access the following types of information: service orders and repair tickets from all wholesale and retail customers; location of an order or ticket within a work group, how long it has been there, and whether there are conditions that might prevent it from being completed by the commitment date; construction activities related to individual customers' service or location; technician names, schedules, availability and work orders assigned to him or her; actual location of technicians; and productivity and performance of technicians and work groups. There simply is no legitimate reason for CLECs to have access to such information. Am. Ill. Rhg. Ex. 13.1 (Waken) at 8-9.

[105] *E.g.*, the key to the gate to the backyard is under the doormat; if no one is home call my sister at xxx-xxxx one hour before work is to be done; daughter will be home alone but will let you in, etc.

[106] Am. Ill. Ex. 2.1 (Jacobson) at 11, 16; Am. Ill. Rhg. Ex. 13.0 (Waken) at 11-14.

such confidential information is stored raises concerns about the safety and privacy of end user customers.[107]

With direct access to LMOS, a CLEC would be able to view information about a customer, whether the customer's number is published or non-published, detailed information about the customer's local service, who provides the customer's long distance service, and information that describes how an outside technician can access and repair the customer's service. LMOS could be used to identify an individual's non-published telephone number, obtain that person's address and locate the cable pairs that serve that person's telephone line. With access to the outside plant facility at a terminal location, an unauthorized person could disable or use the end-user's line for unauthorized purposes, such as making unauthorized long distance calls. Ameritech Illinois currently protects the information in LMOS at the request of the customer and public authorities, in order to prevent unauthorized access, harassment or tampering with the service.[108] If CLECs were given direct access to the back office systems, unauthorized use of and tampering with a customer's service could occur without Ameritech Illinois being able to detect it.[109]

Direct access to back office systems also would enable CLECs to obtain the confidential information of other CLECs and Ameritech Illinois, including information that could be used for marketing or other improper purposes, in violation of Section 222(b) of the Act.[110] For example, ACIS identifies the existing or working service at a given location, and who provides the service, information that always has been treated as confidential and proprietary. Am. Ill. Ex. 2.1

[107] Am. Ill. Ex. 2.1 (Jacobson) at 10-12; Am. Ill. Rhg. Ex. 13.0 (Waken) at 11-14; Attachment B.

[108] Am. Ill. Rhg. Ex. 13.0 (Waken) at 12-13.

[109] Am. Ill. Rhg. Ex. 13.0 (Waken) at 12-13.

[110] Am. Ill. Ex. 2.1 (Jacobson) at 12-13, 20; Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14.

(Jacobson) at 13, 20. Additionally, direct access to LFACs would enable CLECs to see all loops, even those belonging to other CLECs. TIRKS and SWITCH contain an inventory of trunks and circuits, including circuits belonging to CLECs. With direct access to these two systems, a CLEC could search for DS3 trunks between two central offices. The CLEC then would be able to view all of the circuits running over that DS3 and determine the circuit owner. This would allow one CLEC to analyze another CLEC's business and even market penetration.[111] Am. Ill. Rhg. Ex. 13.0 (Waken) at 10.

The information that would be available to CLECs with direct access to Service Order Analysis and Control ("SOAC") also could be used for marketing purposes. SOAC contains data on all open service orders within an Ameritech Illinois geographical area, including: service orders for all retail customers, all special services customers (*i.e.*, burglar alarm, PBX trunks, local transport services), interexchange carrier circuits, and CLEC services for all Ameritech Illinois wholesale and retail customers. Because SOAC does not have the capability to restrict access by service provider or customer type, a user with direct access to SOAC could look at any order and view services being sold by competitors.[112]

The CLECs largely ignore Ameritech Illinois' concern that direct access to back office systems would permit CLECs to obtain information about competitors' business and market penetration, and other such information that could be used for marketing or other improper purposes. Rather, the CLECs, relying on a single Telcordia document with no qualified witness to explain its meaning, make the baseless assertion that, with LEIS/LEAD, Ameritech Illinois

[111] During the cross-examination of Mr. Waken, the CLECs presented a letter sent by SBC to carriers discussing the possibility that CLECs may be able to use gateways to view the confidential information of other CLECs. As explained by Mr. Waken, that letter likely was sent out in response to an Act passed by Congress that required companies to disclose privacy-related issues to their customers. Rhg. Tr. at 2659 (Waken).

[112] Am. Ill. Rhg. Ex. 13.0 (Waken) at 11-12.

has the capability to monitor and analyze the CLECs' involvement in Ameritech Illinois' region, and to develop marketing and engineering strategies, and therefore CLECs should have that same capability. Rhg. Tr. 2618-21. The CLECs are wrong. While it is possible that Telcordia has developed a feature for LEIS/LEAD with the capabilities described by the CLECs, the significant fact is that Ameritech Illinois *does not use* and *has never implemented* such a feature. Rhg. Tr. 2621 (Waken).

Putting aside the fact that direct access to Ameritech Illinois' back office *systems* would present CLECs with the opportunity to use confidential and commercially sensitive information for improper purposes, permitting CLECs to access customer information could violate Section 222 of the 1996 Act, which prohibits a carrier from disclosing or permitting access to customer proprietary network information ("CPNI"), except under limited circumstances:

> Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

CPNI is defined as

> information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
>
> information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

47 U.S.C. 222(f).

The record establishes that direct, unmediated access to Ameritech Illinois' back office systems potentially enables CLECs to obtain CPNI about other carriers and their customers—without the consent of those carriers and customers.[113] As explained above, back office systems

[113] Am. Ill. Ex. 2.1 (Jacobson) at 10-14, 20; Schedule RLJ-2; Am. Ill. Rhg. Ex. 13.0 (Waken) at 11-14.

such as LFACS, SWITCH, TIRKS and ACIS contain information confidential to retail and wholesale customers. Allowing CLECs to browse a database containing information about customers with whom they have no relationship does not fall within the "in connection with the provision of the service from which it was derived" exception contained in Section 222. To the contrary, such access not only would risk the security and safety of end-users, but also could give CLECs a competitive advantage, as it would allow CLECs to use that information for marketing purposes, which violates Section 222(b) of the Act.

The bottom line is that the sensitive information of wholesale and retail customers provided to Ameritech Illinois is so provided with the understanding and the expectation that *no one* outside of Ameritech Illinois will have access to it without the customer's consent. Once CLECs are given unrestricted access to back office systems, it goes without saying that Ameritech Illinois could not control how the CLECs use or protect the information in those systems.[114] Ameritech Illinois, the original custodian of the information, could not dictate what CLEC employees would do or not do with the information—and, even if it could, it could not enforce any restrictions. There simply would be no incentive for CLEC employees *not* to use the information in a way that might present itself as a business opportunity, nor would there be any requirement that CLECs safeguard this sensitive information from unauthorized third parties. Significantly, the CLECs have not identified how the confidential and proprietary information of end users, of other CLECs and of Ameritech Illinois would be protected, or how CLEC employees would be prevented from using such information in an unlawful manner.[115]

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[114] Am. Ill. Ex. 2.1 (Jacobson) at 10-14.

[115] The CLECs suggest that their employees are not "criminals" and, therefore, Ameritech Illinois should not be concerned with proprietary, confidential information being shared with their employees. Rhg. Tr. 2612-13. The CLECs' suggestion that Ameritech Illinois and this Commission should take them on their word that their employees would *never* misuse information, either for marketing purposes or otherwise, defies real-world logic and solves nothing. The fact remains that if proprietary, confidential information in the back office systems is available

For these reasons, the Commission should reject the CLECs' request for direct access to Ameritech Illinois' back office systems.

4. MODIFYING AMERITECH ILLINOIS' BACK OFFICE SYSTEMS TO ACCOMMODATE DIRECT ACCESS BY CLECS WOULD BE COSTLY, TIME CONSUMING AND MERELY REPETITIVE OF THE CAPABILITIES BUILT INTO ELECTRONIC INTERFACES, GATEWAYS AND GUIS.

One significant point to draw from the above analysis is that, if CLECs are permitted direct access to Ameritech Illinois' back office systems, those systems do not have the necessary "firewalls" to prevent CLECs from accessing every piece of information in Ameritech Illinois' databases, including information that is unrelated to the five OSS functions and commercially sensitive information.[116] Rather, if CLECs are permitted direct access to Ameritech Illinois' back office systems, Ameritech Illinois would have to make numerous enhancements to those systems in order to prevent CLECs from viewing confidential information to which they are not legally entitled. These enhancements, however, would be costly and merely repetitive of the OSS gateways' function.[117] Am. Ill. Rhg. Ex. 13.0 (Waken) at 24-28.

The CLECs nevertheless suggest that Ameritech Illinois could easily and inexpensively protect the confidential information in its back office systems by assigning to CLECs passwords that prevent CLECs from accessing systems that contain proprietary information. The CLECs are wrong.[118] The CLECs incorrectly assume that proprietary information is exclusively in a few

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to CLECs, there will be an increased risk that the information will be used for marketing or other improper purposes, and Ameritech Illinois would have no recourse against the CLEC or its employees. Rhg. Tr. 2613-14 (Waken).

[116] Am. Ill. Ex. 2.1 (Jacobson) at 13-14.

[117] Notably, the enhancements discussed in this portion of Ameritech Illinois' Brief on Rehearing do not resolve the capacity limitations of the back office systems referenced below. Indeed, even with the modifications described herein, Ameritech Illinois' back office systems likely would be unable to handle the increased number of users and queries in those systems.

[118] The primary enhancement to the back office systems would be the addition of security features that would allow CLECs to access only that information to which they are legally entitled to access. Since the back office systems were designed for internal use only, these changes would be significant. For example, the back office systems

back office systems, and that a password could prevent CLECs from entering those systems. This is not how Ameritech Illinois' back office systems are set up. As explained above, there are back office systems that contain OSS-related information as well as other, non-OSS-related information. A simple password would not prevent CLECs from accessing the information to which the CLECs are not entitled, while still allowing them to access OSS-related information. Rather, in order to accomplish this, Ameritech Illinois would be required to make massive enhancements to the software in all of its back office systems. As explained herein, those modifications would be very costly. Am. Ill. Rhg. Ex. 13.0 (Waken) at 22-28.

The CLECs also suggest that they easily could directly access Ameritech Illinois' back office systems via a "PC-based GUI front end."[119] Rhg. Tr. 2587-88. Again, the CLECs are wrong. Access to the back office systems is permitted only through secure Ameritech Illinois access facilities. Specifically, Ameritech Illinois does not permit access to the back office systems without going through the secure corporate network, on a dial-up or private line basis. Accordingly, additional costs would be incurred to reconfigure the secure network to accommodate CLEC access to the back office systems. Am. Ill. Rhg. Ex. 13.0 (Waken) at 23. Such expenditures would be particularly wasteful given that CLECs already have electronic interfaces, gateways and GUIs available to them to obtain loop qualification information. In fact, these gateways allow CLECs to obtain all loop qualification information in several back

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would have to be enhanced to designate Customer Proprietary Network Information (CPNI), other service provider information and Ameritech Illinois proprietary information. All of Ameritech Illinois' back office systems would have to be modified to identify this information and segregate it from the information that CLECs are entitled to access. In some cases, the amount of money and time required to enhance the back office system in this manner could exceed the cost of completely replacing it. Am. Ill. Rhg. Ex. 13.0 (Waken) at 22-23.

[119] Obviously, it would be impractical to allow CLECs to access Ameritech Illinois' back office systems via the same terminals used by Ameritech Illinois' employees. As the Texas Arbitrators found in rejecting CLEC requests for direct access to SWBT's back office systems, "it would be impractical for SWBT to allow CLEC personnel physical access to SWBT's offices in order to access the databases via the same terminals ILEC employees use. Rather, access should be provided remotely through a gateway system." *Texas Arbitration Award* at 124.

office systems from a single location. There is no reason to set up yet another interface for the CLECs. Tr. 2658-59 (Waken).[120]

A direct access requirement also would create additional costs to train CLEC employees. As explained below, the information in Ameritech Illinois' back office systems is in various, cryptic formats. In order to decipher this information, CLEC employees would have to undergo significant training to learn the format of each back office system. Along this same line, Ameritech Illinois' back office systems are updated one or more times per year to add new functionality to the application. These updates may affect the information in the back office systems and its presentation. Ameritech Illinois users receive training on these changes, and CLEC employees would require training on such changes as well. Am. Ill. Rhg. Ex. 13.0 (Waken) at 26-27.

Aside from the pure cost of the network enhancements needed to accommodate direct access, making such enhancements simply would not make sense for at least two reasons. *First*, it would be illogical to require Ameritech Illinois to incur substantial costs to accommodate direct access when there is no evidence that CLECs would be able to obtain through such direct access any additional loop qualification information beyond that which they already receive from

[120] Aside from the addition of security features, a direct access requirement likely would force Ameritech Illinois to incur additional costs to develop new functionality in its back office systems. Ameritech Illinois does not provide advanced services and, therefore, functions performed by Ameritech Illinois when accessing its back office systems may not match the functions needed by the CLECs when directly accessing those systems. As a result, CLECs likely would request new functionality or a different presentation of the information by the back office systems. Am. Ill. Rhg. Ex. 13.0 (Waken) at 23. To complicate matters further, CLECs may not agree on the functionality required, and some CLECs may identify a business need for something different than other CLECs. Accordingly, Ameritech Illinois would incur additional costs to accommodate those additional requests—which costs Ameritech Illinois would expect to recover from CLECs. Am. Ill. Rhg. Ex. 13.0 (Waken) at 25. It also should be noted that many of Ameritech Illinois' back office systems are very old, and Ameritech Illinois' back office employees use older technology hardware and software to directly access the back office systems. In order for CLECs to directly access such back office systems, they may be required to purchase and maintain this same type of terminal access equipment and software, or SBC would be required to modify the applications to accommodate non-SBC standard equipment. Again, Ameritech Illinois would expect to recover the additional costs associated with rearrangement of the SBC secure network to accommodate such access. Am. Ill. Rhg. Ex. 13.0 (Waken) at 24.

Ameritech Illinois. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 13-14, 50-51. *Second*, building "firewalls" into Ameritech Illinois' back office systems merely would be repetitive of the functions built into the gateways. Indeed, Ameritech Illinois' gateways already enable CLECs to obtain pre-ordering, ordering, provisioning, maintenance and repair, and billing information, while at the same time preventing CLECs from viewing information that they are not legally entitled to access.[121] There simply is no reason to build similar functionality into the back office systems. Am. Ill. Rhg. Ex. 13.0 (Waken) at 14.[122]

Q. THERE IS NO DEMONSTRABLE BENEFIT TO ALLOWING DIRECT ACCESS TO BACK OFFICE SYSTEMS, AND SUCH ACCESS COULD HARM AMERITECH ILLINOIS' SYSTEMS.

As the Hearing Examiners recognized in their Proposed Order on Rehearing in Docket No. 00-0592, "the purpose of electronic gateways such as EDI and GUIs is to provide information contained in Ameritech Illinois' OSS systems electronically and eliminate the need for a direct access requirement." *00-0592 Rehearing HEPO* at 13. In fact, when it comes to provisioning service, there simply is no benefit to direct access as compared to gateway access. Among other things, the loop qualification information that CLECs would receive with direct access would be identical to the information already accessible to CLECs via Ameritech Illinois' electronic interfaces, gateways and GUIs. Additionally, obtaining loop qualification information

[121] The record establishes that Ameritech Illinois' gateways do not filter the information related to the five OSS functions, to which CLECs are legally entitled. That information is fully available to CLECs and, in fact, the CLECs have not identified any specific piece of information that they are not already receiving from Ameritech Illinois. Am. Ill. Ex. 2.1 (Jacobson) at 13-14; Am. Ill. Rhg. Ex. 13.0 (Waken) at 20-21.

[122] Notably, it is unlikely that creating "firewalls" in the back office systems would settle the dispute here. The CLECs have never indicated that such "firewalls" would be acceptable. Moreover, throughout this proceeding, the CLECs have argued that Ameritech Illinois' OSS gateways filter out loop qualification information to which they are entitled. Although the CLECs fail to identify any specific piece of information that purportedly is "filtered," the CLECs likely would make similar, unsubstantiated claims with respect to "firewalls" built into the back office systems. Ameritech Illinois and the CLECs therefore would be in no better position than they are today—the only difference being that Ameritech Illinois would have wasted substantial time and resources to build "firewalls" in the back office system.

via direct access to Ameritech Illinois' back office systems would be substantially slower than obtaining the same information from the OSS gateways and, unlike the information received from the gateways, the information obtained from the back office systems would not be in the appropriate format for ordering. It also is likely that CLECs would be unable to utilize the information in Ameritech Illinois' back office systems, because that information is in various cryptic formats and, absent extensive training on each and every back office system, the information would be undecipherable.[123] Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 8-14; Am. Ill. Rhg. Ex. 13.0 (Waken) at 15-20.

The CLECs may suggest that the disadvantages of direct access as compared to gateway access should not be of concern to Ameritech Illinois, because the CLECs do not care if direct access is slower and more difficult to use than Ameritech Illinois' electronic interfaces, gateways and GUIs. Rhg. Tr. 2572-73. The CLECs are wrong. As explained below, the CLECs' direct access proposal could slow down the processing of *all* service orders or possibly cause complete failure of the systems and, therefore, would affect more than just CLEC users of the back office systems. Moreover, the fact that direct access to back office systems provides no benefit in terms of provisioning DSL service calls into question the CLECs' true motivation for requesting such access. Indeed, given that direct access to back office systems will not provide CLECs with any additional loop information beyond that which they already receive through Ameritech Illinois' interfaces, gateways and GUIs, and given the clear disadvantages of using direct access as compared to gateway access, the CLECs' claim that they need direct access in order to

[123] The CLECs suggest that they should be allowed to perform a manual loop qualification themselves in order to avoid paying Ameritech Illinois twenty dollars to do so. Rhg. Tr. 2595-96. Aside from the cost and inefficiencies of direct access described herein, it would not be practical to have the CLECs perform manual loop qualification, because part of the LFAC clerk's responsibility is to correct the error that caused the loop qualification request to fall out. With read-only access, the CLECs would not (and should not) be able to manipulate the system to correct the error and, therefore, the next request also would fall out, resulting in the need for another manual loop qualification. Rhg. Tr. 2629 (Waken).

provision DSL service simply does not add up. Rather, it appears as though the CLECs' true motivation for requesting direct access is something entirely different and, perhaps, related to the possibility of obtaining marketing or other competitively sensitive information—which appears to be the only conceivable "benefit" that CLECs stand to derive from direct access. The Commission should not impose requirements that would enable CLECs to use Ameritech Illinois' systems and the information contained therein for such improper purposes.

1. DIRECT ACCESS WILL NOT PROVIDE CLECS WITH ANY MORE LOOP QUALIFICATION INFORMATION THAN THEY ALREADY RECEIVE VIA AMERITECH ILLINOIS' ELECTRONIC INTERFACES, GATEWAYS AND GUIS.

Direct access to Ameritech Illinois' back office systems would not provide CLECs with any additional information than they already receive via Ameritech Illinois' electronic interfaces, gateways and GUIs. Rather, CLECs will just be receiving the same OSS information through a different (and more difficult to use) means.[124] Although it could be said that Ameritech Illinois' OSS gateways perform some "firewall" functions (because they do not allow CLECs to access confidential information, unrelated to the five OSS functions), the fact remains that Ameritech Illinois' OSS gateways do not filter any loop qualification information or other information to which CLECs are legally entitled. Rather, the OSS gateways will always be programmed to retrieve all data to which the CLECs are legally entitled. Am. Ill. Rhg. Ex. 13.0 (Waken) at 20-21.

This fact is confirmed by the CLECs' failure to identify any loop qualification information that they claim to need and are not already receiving, why it is needed, or why the CLECs are not able to obtain it via Ameritech Illinois' electronic interfaces, gateways or GUIs. Indeed, although the CLECs have conducted an audit of Ameritech Illinois' back office systems,

[124] Am. Ill. Ex. 2.1 (Jacobson) at 14-16; Am. Ill. Rhg. Ex. 13.0 (Waken) at 18-20.

they have not identified any loop qualification information that they need to provision service that is not already provided by Ameritech Illinois. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 46. The reason for this failure is clear—there is no such information.[125] The only additional information CLECs will receive with direct access to back office systems is non-OSS-related, confidential information of end-user customers, other CLECs and Ameritech Illinois—information that CLECs are not legally entitled to access and that could be used for improper purposes.[126]

Covad suggests that Ameritech Illinois is not meeting its obligation to provide loop qualification information because Ameritech Illinois purportedly is not providing loop qualification information on multiple loops or spare loops. Covad is wrong. Mr. Waken testified that information on spare facilities is available to CLECs through the dispatch function (which is part of Verigate), and that such functionality will become part of LoopQual in Release 11 later this year. Rhg. Tr. 2581-83 (Waken). With respect to loop qualification information on multiple loops, in their Proposed Order on Rehearing in Docket No. 00-0592, the Hearing Examiners concluded that Ameritech Illinois should be required to provide loop qualification information to

[125] The CLECs make a few strained attempts to identify pieces of loop provisioning information that they purportedly are not receiving from Ameritech Illinois via its electronic interfaces, gateways and GUIs. These assertions, however, are baseless. For example, Rhythms suggest that Ameritech Illinois is not providing loop qualification information on Pronto loops. Rhythms' assertion is irrelevant and wrong. As the record establishes, Ameritech Illinois has a database called PRONTO Construction Administration Tool ("PCAT"), which is a construction and engineering tool and which, as a result, contains information that tracks the deployment of Pronto equipment in each geographic region. Am. Ill. Rhg. Ex. 13.0 (Waken) at 4. However, because the deployment of Project Pronto in Illinois has been suspended, PCAT contains no deployment information for the state of Illinois and, as a result, there is no loop qualification information for Ameritech Illinois to provide to CLECs. In any event, where Pronto is deployed, PCAT already provides the LoopQual gateway with the availability dates and "turn-up" information about Pronto facilities at each remote terminal location. The scheduling information contained in PCAT also is available to CLECs through a GUI called DSL-Tracking Inquiry ("DTI"). In addition to providing scheduling information through LoopQual and DTI, Ameritech provides facility completion information to CLECs six months in advance, pursuant to FCC network disclosure rules. Am. Ill. Rhg. Ex. 13.1 (Waken) at 13; Rhg. Tr. 69 (Waken). Although the CLECs raise concerns about obtaining information if a construction schedule slips, CLECs will be notified of such delays through network disclosure, as explained by Mr. Waken. Rhg. Tr. 2568-69 (Waken). Because the CLECs have several different means to obtain the scheduling information contained in PCAT, there is no basis for their claim that such information is not available to them.

[126] Am. Ill. Ex. 2.1 (Jacobson) at 10-14; Am. Ill. Rhg. Ex. 13.0 (Waken) at 9-14.

CLECs for only up to 10 available loops and, if that recommendation is adopted by the Commission, Ameritech Illinois will provide that information to CLECs.

Covad also suggests that the loop qualification information it receives from Ameritech Illinois is inadequate, because Ameritech Illinois does not provide information about the *type* of load coil present on a loop. Rhg. Tr. 2642. The CLECs clearly are grasping at straws. Ameritech Illinois provides CLECs with information about the presence, location and quantity of load coils. The CLECs have not previously expressed a need for information relating to the *type* of load coil present on a loop, nor have the CLECs explained why such information might be needed. In fact, the *type* of load present on a loop is entirely irrelevant to provisioning service, because DSL service will not work if *any* type of load coil is present.

It is again worth noting that, even if the CLECs' claims regarding multiple-loop, spare loop and type of load coil had merit (which they do not), that in itself says nothing about whether CLECs should be given direct access to Ameritech Illinois' back office systems. As the Hearing Examiners recommended in Docket No. 00-0592 in their Proposed Order on Rehearing, and as the Texas Arbitrators found in their Arbitration Award, CLECs have absolutely no right to directly access an ILEC's back office systems in order to obtain any type of information. Rather, if it is proven that CLECs need additional loop qualification information from Ameritech Illinois, that information should be provided via electronic interfaces, gateways and GUIs. In this case, the CLECs have not identified a single piece of loop qualification information that they need to provision service that they are not already receiving from Ameritech Illinois. The fact that CLECs already receive the information they need to provision service is confirmed by the *UNE Remand Order.* Indeed, in the *UNE Remand Order (*¶ 427*),* the FCC gave examples of the type of "detailed information about the loop" that ILECs must make available:

> (1) the composition of the loop material, including, but not limited to, fiber optics, copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies.

The record establishes that, through its gateways and GUIs, Ameritech Illinois already makes available to CLECs all the information necessary to support HFPL-related OSS functions.[127]

2. AMERITECH ILLINOIS' ELECTRONIC INTERFACES, GATEWAYS AND GUIS PROVIDE CLECS WITH INFORMATION MUCH MORE QUICKLY THAN DIRECT ACCESS.

In terms of speed and efficiency, access to information via Ameritech Illinois' electronic interfaces, gateways and GUIs is preferable to direct access to back office systems. If a CLEC were to directly access a back office system, the CLEC only would be able to obtain the information in that specific system and, therefore, would have to access other back office systems in order to obtain other types of information. Moreover, if a CLEC were to directly access a back office system, the CLEC would be able to search for only one piece of loop qualification information at a time. As a result, in order to obtain loop qualification information via direct access to Ameritech Illinois' back office systems, a CLEC would have to make multiple transactions in multiple back office systems in order to accumulate all of the information to satisfy the CLEC's loop qualification request. Based on recent samples, this manual operation typically requires fifteen to twenty minutes, if engineering records are in an electronic format, just to obtain one piece of loop qualification information. Assuming CLECs

[127] Am. Ill. Ex. 2.1 (Jacobson) at 17-20, 23.

want to obtain all 45 loop qualification elements, it would take a substantial amount of time to obtain that information via direct access.[128]

This task would become even more time consuming if a CLEC wanted to place a service order. Ordering involves the transmission of a local service request ("LSR") from the CLEC to Ameritech Illinois. If a CLEC were to directly access a back office system, it could not automatically place an order after gathering the necessary information, because the back office systems do not have that functionality and, in fact, the information contained in the back office systems is not in the proper format for ordering. Accordingly, if a CLEC wished to place a service order after obtaining information from Ameritech Illinois' back office systems, the CLEC would have to exit the back office systems, enter an OSS gateway to create an LSR from scratch, translate the information obtained from the back office systems into the correct ordering format, and manually insert that information in a newly created LSR. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 9-10; Am. Ill. Rhg. Ex. 13.0 (Waken) at 17.

In contrast, with access to loop qualification information via Ameritech Illinois' OSS interfaces, gateways and GUIs, such delays would not occur. Ameritech Illinois has designed the Loop Qualification system to return identical results (all 45 loop qualification elements, if available) to the requesting CLECs in 120 seconds or less, and that information is returned in the proper format for use in the LSR. Am. Ill. Rhg. Ex. 13.0 (Waken) at 18, 20. Additionally, CLECs can integrate the EDI ordering gateway with the EDI/CORBA pre-ordering interface to provide an integrated pre-ordering and ordering system.[129] With such a system, once a CLEC

[128] Am. Ill. Rhg. Ex. 13.0 (Waken) at 18, 20.

[129] The CLECs suggest that Ameritech Illinois' electronic interfaces, gateways and GUIs do not provide CLECs with flow-through. The CLECs are wrong. Ameritech Illinois' systems provide flow-through without manual intervention. The CLECs, however, are confusing flow-through with integration. As explained in the text, if a CLEC wants integration between pre-ordering and ordering functions, it is up to the CLEC to modify its systems on its side of the interface. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 9-10, 49.

has transmitted a loop qualification request to Ameritech Illinois, the request will be processed by the OSS interface software, which automatically translates the requested information into the correct ordering format and automatically populates the fields of the LSR. The CLEC can then immediately submit the order. Again, this all occurs in a matter of seconds. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 10.

In short, it simply cannot be said that it is more efficient for CLECs to spend fifteen to twenty minutes just to obtain one piece of loop qualification information when they can obtain all available loop qualification information in a matter of seconds via Ameritech Illinois' electronic interfaces, gateways and GUIs.[130]

3. CLECS LIKELY WOULD BE UNABLE TO DECIPHER THE INFORMATION IN AMERITECH ILLINOIS' BACK OFFICE SYSTEMS.

Even if CLECs were given direct access to Ameritech Illinois' back office systems, they likely would be unable to utilize the information. The databases to which the CLECs seek direct access have developed and changed over decades. Each back office system has its own language, methods and procedures, and the format in which information is stored varies from region to region. With direct access, CLECs will receive information in various cryptic formats that would be undecipherable, absent extensive, on-going training. This is inconsistent with the intent of the FCC's Merger Conditions, which sought uniformity of OSS across SBC's 13 states. Moreover, even if the CLECs could decipher the information obtained directly from the back

[130] It also should be noted that, unlike Ameritech Illinois' OSS gateways, almost all of the Ameritech Illinois' back office systems use a "Text Interface." This is an old technology that was developed before the widespread use of personal computers. A Text Interface usually has a black and white screen, cannot show pictures or drawings, and usually does not support a mouse. Accordingly, it is easier to navigate with use of GUI technology than it would be to navigate through a back office system itself. In fact, in order to make information easier for a customer CLEC to access, SBC has used GUI technology to improve the front-office OSS, *e.g.*, Loop Qual. Although GUI technologies could be added to the back office systems, the cost of doing so presently would far exceed the benefits, and adding GUI technology to back office systems would merely be repetitive of the GUIs Ameritech Illinois already provides for the OSS gateways. Am. Ill. Rhg. Ex. 13.0 (Waken) at 15-16.

office systems, the information still would have to be translated into a LSR format for ordering. Am. Ill. Rhg. Ex. 13.0 (Waken) at 17; Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 11-12.

In contrast, one function of electronic interfaces, gateways and GUIs is to convert the information in the back office systems into standardized fields that can be recognized by all CLECs. These systems are simple and efficient means of transporting data and allowing CLECs to access OSS information in a uniform and standardized format that is easy to read. What's more, unlike back office systems, Ameritech Illinois' interfaces and gateways return information in the proper format for ordering. Given these efficiencies, using gateways to obtain OSS-related information clearly is preferable to direct access to back office systems.[131]

4. DIRECT ACCESS TO AMERITECH ILLINOIS' BACK OFFICE SYSTEMS COULD CAUSE THE SYSTEMS TO FAIL.

There are fundamental differences between front-end OSS gateways and back-end systems. Unlike front-end OSS gateways, Ameritech Illinois' back office systems were not designed to accommodate direct access by CLECs, but were designed to store information. For this reason, back office systems have severe capacity limitations. If CLECs are allowed direct access to Ameritech Illinois' back office systems, there will be more users and queries in those systems.[132] At best, these additional users and queries could slow down the processing of all service orders. At worst, the capacity restrictions of Ameritech Illinois' back office systems are such that providing access to many additional users could cause the systems to fail. Am. Ill. Ex. 2.1 (Jacobson) at 14; Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 12-13; *Id*. Ex. 9.1 (Mitchell) at 5-7; Tr. at 877-80 (Jacobson); Rhg. Tr. 1711-12 (Mitchell), 2575-78 (Waken).

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[131] Am. Ill. Ex. 2.1 (Jacobson) at 16-17; Am. Ill. Rhg. Ex. 13.0 (Waken) at 19-20; *Id*. Ex. 9.0 (Mitchell) at 11-12.

[132] Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 12-13. As Mr. Waken testified, the number and complexity of queries made in the back office systems causes the system to slow down. Rhg. Tr. 2637 (Waken).

Ameritech Illinois uses OSS gateways to minimize the negative impact that large volumes of queries, as well as overly complex queries, can have on its back office systems. Gateways only permit certain types of queries to be made in the back office systems and act as a sort of buffer between the gateway user and the back office systems. For instance, on a loop qualification inquiry, the front-end OSS gateway is going to reject any query that is inappropriate before it hits the back office system. In contrast, with direct access, there would be no mechanism to prevent improper queries from being made in the back office systems. As Mr. Waken explained during cross examination, if 70,000 queries were made by CLECs and 10% of those were invalid, the gateway would never send those invalid queries to the back office system and, therefore, the back office system would see 10% fewer queries than if all queries (valid and invalid) were made directly to the back office system. Rhg. Tr. 2575-78 (Waken). Additionally, the front-end OSS gateway will send queries to two different middleware systems, AEMS and SAM, which direct the queries to specific areas of the back office systems necessary for the return of the appropriate information. In contrast, with direct access, there is no mechanism to prevent queries from being made in the wrong back-end system. Am. Ill. Rhg. Ex. 9.0 (Mitchell) at 12-13; *Id*. Ex. 9.1 (Mitchell) at 5-7; Rhg. Tr. 1711-12 (Mitchell), 2575-78 (Waken).

Using the OSS gateways to access information is different from direct access in at least one other important aspect. If CLECs are permitted direct access to Ameritech Illinois' back office systems, multiple service representatives of multiple CLECs presumably would be logged into the back office systems for eight hours or more a day. Back office systems currently are not exposed to such use. Rather, when an OSS gateway is used, it only makes a hit in the back office system when it has an inquiry. The information is sought in the system and, when it is found, the back office system is exited. Tr. 874-75 (Jacobson); Rhg. Tr. 1711-12 (Mitchell),

2575-78 (Waken); Am. Ill. Rhg. Ex. 9.1 (Mitchell) at 7. Additionally, Ameritech Illinois employees that have direct access to Ameritech Illinois' back office systems (although small in number when compared to the total number of Ameritech Illinois employees or the potential number of CLEC representatives that would directly access Ameritech Illinois' systems under the CLECs' proposal) are automatically logged off the back office system whenever there is a certain amount of inactivity in the system. This policy is in place for security reasons, as well as to avoid consuming system resources—which, of course, would slow down the system for other users. Rhg. Tr. 2639 (Waken).

Rhythms nevertheless contends that, in other proceedings, SBC experts "testified unequivocally in the Texas line sharing proceeding that they have never heard of any SWBT *OSS* failing due to too many users accessing the systems simultaneously." Rhythms also asserts that SWBT testified that OSS have fail-safe mechanisms to prevent system failure. The testimony Rhythms cites relates to the possibility of OSS *interfaces*, *gateways* and *GUIs* failing and the fact the some OSS may have fail-safe mechanisms. This says nothing about the capabilities of *back office systems* and whether back office systems can handle direct access by numerous CLECs. In fact, in the very proceedings referenced by Rhythms, SWBT's witnesses explained that SWBT's back office systems could fail if CLECs were permitted direct access to them. Rhythms simply is misrepresenting the subject matter experts' testimony in an attempt to confuse the issue. Am. Ill. Rhg. Ex. 9.1 (Mitchell) at 5-6.

In short, the electronic interfaces, gateways and GUIs used by Ameritech Illinois' retail representatives and by CLECs serve to protect the back office systems from the dangers of direct access, while providing CLECs with all the loop qualification information they need to provision

service. CLECs should continue using these mechanisms to access the information in Ameritech Illinois' back office systems.

* * *

In summary, the only lawful, and logical, solution to the direct access issue is for the Commission to deny such access. Rather, the Commission should require the CLECs to identify the specific loop qualification information they need to provision service that they are not already receiving from Ameritech Illinois and, if such information is identified, require Ameritech Illinois to upgrade its electronic interfaces, gateways and GUIs to provide that information. This solution avoids the negative impact that a direct access requirement would have on Ameritech Illinois' back office systems, and the unnecessary cost of building back office system "firewalls" that would be duplicative of the gateways' function. At the same time, this proposal provides CLECs with the opportunity to identify loop qualification information that they may believe they are not receiving from Ameritech Illinois.[133] Such an approach is consistent with the decision of the Texas Arbitrators, who found that "the issue is not direct access vs. gateway, but whether the access the gateway provides is adequate." *Texas Arbitrators' Award* at 124. In this case, the record establishes that Ameritech Illinois' gateways provide CLECs with all the loop qualification information they need to provision service, and are far superior to imposing any direct access requirement.

VI. HFPL-RELATED CHARGES

The HFPL pricing issues raised in this rehearing include: (1) the appropriate recurring charge for the HFPL UNE; (2) the appropriate charge for HFPL-related OSS modifications; and

[133] Protecting confidential information in this manner is commonplace, because using OSS gateways to perform this function is less costly than making modifications to the legacy back office systems. Am. Ill. Rhg. Ex. 13.0 (Waken) at 21.

(3) the appropriate charge for manual loop qualification. Ameritech Illinois' proposed prices for the above elements are reasonable, accurately represent the costs Ameritech Illinois actually will incur to provide these elements, and should be adopted by the Commission. As explained below, the Order's requirement that Ameritech Illinois charge nothing for each of these elements is unlawful and would be bad policy.

Before reaching the specific legal flaws and negative policy implications of the prices adopted by the Order, it is necessary to point out that a zero charge for any or all of these elements would effect a taking of Ameritech Illinois' property without just compensation – indeed, without any compensation – which is unconstitutional. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020 (1st Cir. 1989); *Mississippi River Fuel Corp. v. FPC*, 163 F.2d 433, 437 (D.C. Cir. 1947). Takings principles still apply under the 1996 Act: "Suffice it to say that this court construes the Act to require that just and reasonable compensation be paid for the services GTE provides to MCI" under their interconnection agreement.[134] Moreover, TELRIC itself is intended – as required by Section 252(d)(1) of the 1996 Act – to establish "just and reasonable rates while providing the incumbent LEC with a reasonable profit."[135] The Order's requirement that Ameritech Illinois charge nothing for the HFPL UNE, HFPL-related OSS modifications and manual loop qualification does not satisfy the TELRIC standard, nor does a zero charge for any of these elements satisfy the constitutional requirement that "just compensation" be paid when private property is taken. Indeed, a zero price for any of these elements would amount to an unlawful taking by compelling Ameritech Illinois to provide the HFPL UNE, HFPL-related OSS

[134] *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1158, 1170 (D. Or. 1999).

[135] *Southwestern Bell Tel. Co. v. AT&T Communications*, No. A 97-CA-132SS, 1998 WL 657717, at *13 (W.D. Tex. 1998).

modifications, and manual loop qualification to CLECs at no charge, which plainly is not "just and reasonable compensation."

Significantly, Illinois courts have reversed decisions by this Commission that completely denied compensation for the use of a utility's facilities or services, as the Order does. *See Illinois Bell Tele. Co. v. ICC*, 286 Ill. App. 3d 340, 341 (3d Dist. 1997) (Commission decision to deny Ameritech Illinois' request for compensation for the use of its payphone facilities beyond the revenue received for carrier access services reversed and remanded by the Court); *Citizens Utilities Co. of Illinois. v. ICC,* 153 Ill. App. 3d 28, 35 (3d Dist. 1987) (Commission's decision to deny Citizens any working capital allowance reversed and remanded by the Court); *Candlewick Lake Util. Co. v. ICC,* 122 Ill. App. 3d 219 (2d Dist. 1983) (Commission decision to apply a zero rate of return to a substantial part of the property of the utility reversed and remanded by the Court).

Aside from the blatant illegality of the zero prices adopted by the Order, allowing CLECs to pay nothing for the HFPL UNE, HFPL-related OSS modifications, and manual loop qualification would give data CLECs an unfair, artificial competitive advantage in the advanced services market. Indeed, permitting data CLECs to pay virtually nothing for the facilities and modifications necessary to permit them to utilize the HFPL UNE and provide advanced services, while other providers of advanced services pay a positive price for the facilities they use to provide service, is inequitable, contrary to efficient competition, and fundamentally at odds with the pro-competitive purposes of the 1996 Act. In the interest of fair competition, the Commission should prevent data CLECs from reaping a windfall through the free use of Ameritech Illinois' assets and services.

For these reasons, and all the other reasons set forth below, the Commission should modify the Order and adopt Ameritech Illinois' proposed charges for the HFPL UNE, HFPL-related OSS modifications and manual loop qualification.

R. MONTHLY RECURRING CHARGE FOR THE HFPL UNE.

1. THE APPROPRIATE PRICE OF THE HFPL UNE IS 50% OF THE UNBUNDLED LOOP PRICE.

The Commission should adopt Ameritech Illinois' proposal that the monthly recurring price for utilizing the HFPL UNE be 50% of the Commission-approved monthly recurring unbundled loop price (plus the incremental facilities and operations costs caused by sharing the loop). This is the appropriate approach to setting the price for this new unbundled network element for several reasons. Am. Ill. Ex. 3.0 (Carnall) at 19-20.

First, this price provides a significant discount to CLECs in comparison to the price they would have to pay for an entire loop. *Id.* at 20. This discount, in turn, will encourage CLECs to enter the residential market. More specifically, before the HFPL UNE was available, CLECs wishing to use Ameritech Illinois' facilities to provide DSL service were required to purchase an entire loop from Ameritech Illinois. Under Ameritech Illinois' proposal, CLECs can purchase the high frequency portion of that loop at a *substantial discount* – 50% off the current loop price. While this discount will provide a significant incentive for additional data CLECs to enter the local market through use of the HFPL UNE, setting the price at a positive (*i.e.*, greater than zero) amount will avoid eliminating the CLECs' incentive to invest in their own facilities. Indeed, setting a positive price will encourage the deployment by CLECs of their own facilities, including their own loops, where it is economical to do so.[136] Am. Ill. Ex. 3.0 (Carnall) at 6.

[136] The effect of a zero price for the HFPL UNE on facilities-based competition is discussed in more detail below.

Second, and of equal importance, Ameritech Illinois' proposed recurring HFPL UNE price is fully consistent with the FCC's TELRIC pricing principles. Under the FCC's TELRIC principles, the cost of a line-shared loop is a *shared* cost that must be reasonably allocated between the services that cause that cost. Am. Ill. Ex. 3.0 (Carnall) at 10-12. More specifically, in its *First Report and Order* (¶ 29), the FCC explicitly recognized that UNE prices should include a "reasonable share of forward-looking joint and common costs." Similarly, in the *Line Sharing Order*[137] (¶ 138), the FCC stated that this Commission, in setting the price for the HFPL UNE, should "adopt a reasonable method for dividing shared loop costs." Accordingly, in establishing the price for the HFPL UNE, the Commission must reasonably allocate the cost of the entire loop between the high and low frequency portions. *Id.*

Ameritech Illinois' proposal that the monthly recurring price for the HFPL UNE be 50% of the Commission-approved monthly recurring unbundled loop price fully comports with the above TELRIC pricing principles. *Id.* Indeed, because there are two dedicated connections on a single loop when a CLEC leases the HFPL, those two connections – the voice service and the data service – jointly cause the cost of the loop, and it is therefore reasonable (and necessary) to divide the cost of the loop equally between those two uses. Given that the CLECs have not presented any evidence that the market would place a greater value on the low frequency portion loop than on the high frequency portion, common sense and basic economic principles dictate that the loop costs should be allocated equally to the two uses that jointly cause the cost.

Third, Ameritech Illinois' proposed price recognizes that, because CLECs are receiving dedicated use of the high frequency portion of the loop, they should pay for that use. Indeed, it is

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[137] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket 98-147, Fourth Report and Order in CC Docket No. 96-98 (rel. December 9, 1999) ("*Line Sharing Order*").

patently unreasonable to require a company to "sell" any product or service at a zero price, as the CLECs are proposing in this proceeding. The Order's zero price is tantamount to requiring Ameritech Illinois to "give away" the HFPL product. Such a result obviously is not competitively neutral, as it places other broadband service technologies that are not priced at zero – such as cable modem facilities or wireless facilities – at a decided competitive disadvantage. Am. Ill. Ex. 3.1 (Carnall) at 15-19. The anti-competitive effect of the Order's $0 price for the HFPL UNE is discussed in more detail below.

Notably, allocation of 50% of the loop price to the HFPL also is consistent with the surrogate HFPL UNE price set by the FCC in its Order approving the SBC/Ameritech merger (¶¶ 369, 476) when access to the actual HFPL was not yet available.

2. THE ORDER'S ZERO MONTHLY PRICE FOR THE HFPL UNE IS UNLAWFUL AND UNWISE AS A MATTER OF POLICY.

a. A ZERO MONTHLY PRICE FOR THE HFPL UNE CONFLICTS WITH GOVERNING LAW.

Setting the monthly recurring charge for the HFPL UNE at zero conflicts with the legal requirements of Sections 252(c) and 252(d)(1) of the 1996 Act. Section 252(d)(1) states that a commission's determination of UNE prices *shall* be "based on the cost (*determined without reference to a rate-of-return or other rate-based proceeding*) of providing the network element" and "may include a reasonable profit" (emphasis added). In other words, determining the charge for the HFPL UNE depends on the cost of providing the UNE, not on the retail charge an end-user pays for voice service. Significantly, in its Order approving the SBC/Ameritech merger, the FCC necessarily found that any potential for recovery of such so-called "loop costs"

through retail rates was irrelevant, when it established a surrogate HFPL UNE price of 50% of the cost of an entire unbundled loop when the HFPL UNE was not available.[138]

Nevertheless, in support of its zero price for the HFPL UNE, the Order relies on the irrelevant claim that allocation of 50% of the loop cost to the HFPL purportedly will result in "double recovery" of those loop costs, because Ameritech Illinois purportedly recovers the costs of the entire loop through its retail rates. Putting aside for a moment the fact that there is no record evidence to support this assertion, the Order disregards the clear statutory mandate that retail rates cannot be considered in setting UNE prices. Indeed, the Order engages in precisely the kind of "rate of return" analysis that the 1996 Act prohibits in determining appropriate UNE prices. Under the law, Ameritech Illinois' retail prices and revenues are not (and cannot be) an issue in this proceeding. Tellingly, the Order fails to address Section 252(d)(1) of the Act, because it clearly conflicts with it.

Even if the potential "double recovery" of such "loop costs" through retail rates were legally relevant, there is no evidence in the record that Ameritech Illinois is in fact recovering the entire cost of the loop in retail rates. Rather, the record suggests that just the opposite is true. For example, the record establishes that Ameritech Illinois has not been subject to rate-of-return regulation since 1994 (as it has been subject to alternative regulation since that time) and, therefore, has no assurance that it will recover the entire cost of the loop – including all shared and common costs – in retail rates. Am. Ill. Ex. 3.0 (Carnall) at 20-21.

Additionally, the rates that form the bases for Ameritech Illinois' current retail rates were set under conditions very different from those that exist today. In Ameritech Illinois' last general rate case, its retail rates were set to recover the full cost of providing all of its regulated services,

[138] *Applications of Ameritech Corp. SBC Communications, Inc.*, 14 FCC Rcd 14712, ¶ 476; Appendix C (Conditions Appendix), ¶¶ 8, 14 (rel. Oct. 8, 1999) ("*SBC/Ameritech Merger Order*") (emphasis added).

assuming that Ameritech Illinois would serve all the demand for those services. In other words, those rates assumed that Ameritech Illinois would be guaranteed its service franchise and that its regulated prices would be protected from the pressures of competition. These conditions no longer exist in today's market. The 1996 Act opened telecommunications markets to competition and, as a result, Ameritech Illinois' retail products now face competition from CLECs. Indeed, there are now about 59 CLECs active within Ameritech Illinois' territory. At the end of 1999, these CLECs served approximately 542,688 lines, 285,116 of which were provided by means other than resale. Am. Ill. Ex. 3.0 (Carnall) at 20-21.

It also is unlikely that Ameritech Illinois recovers the entire cost of the loop in retail rates because much of Ameritech Illinois' costs are related to capital investments that must be recovered over a number of years. Full recovery of those costs requires maintenance of adequate revenue streams over the entire recovery period, not just for one or two years. Consideration of current revenues, therefore, is insufficient to determine whether Ameritech Illinois will fully recover all of the costs of unbundled loops. Equally significant, because retail prices were set to recover costs on average, revenues from high-usage and lower cost customers contribute more to the recovery of total costs than do the revenues from low-usage and higher-cost customers. It is precisely these high-margin customers that are first targeted by CLECs. As such customers are lost by an ILEC, its retail revenues are reduced, and the contribution these high-margin customers provided toward the overall recovery of the costs to provide service to lower-margin customers is lost.[139] Am. Ill. Ex. 3.0 (Carnall) at 20-21. Notably, between December 1998 and March 2000, Ameritech Illinois' retail business access lines fell by 105,146 lines. *Id.* at 21.

[139] Significantly, there is no basis to assume that the availability of the HFPL UNE will have a positive effect on Ameritech Illinois' revenues. For example, the HFPL UNE allows customers who currently maintain a second phone line specifically for dial-up Internet access to discontinue that line without affecting their ability to make phone calls while connected to the Internet, thus depriving Ameritech Illinois of the revenues generated from that

In any event, competition will preclude Ameritech Illinois from over-recovering its loop costs. Am. Ill. Ex. 3.0 (Carnall) at 21. For example, full spectrum copper loops are available, at a cost-based price, to all CLECs. Any CLEC, or combination of CLECs, can therefore provide both voice and DSL services over that loop at a combined price that reflects only the actual cost of the loop. If Ameritech Illinois were to attempt to over-recover the cost of the loop, the combined price of voice service provided by Ameritech Illinois and data service provided by a CLEC over the HFPL UNE would exceed the price of combined voice and data service provided entirely by a CLEC over its own loops or over UNE loops leased from an ILEC. The CLECs would, therefore, be able to undercut the price for the Ameritech Illinois/CLEC combined service.

In short, although retail rates should not (and cannot) be considered in setting the price of the HFPL UNE, the record establishes that it is unlikely Ameritech Illinois recovers the entire cost of the loop – including all shared and common costs – in its retail rates. The CLECs have presented no evidence to the contrary.[140] It should be noted that several state commissions have rejected a $0 price for the HFPL UNE. Specifically, the California,[141] Connecticut[142] and

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second line. The development of voice over DSL may also have an adverse effect on Ameritech Illinois' revenue. In fact, as CLECs become capable of providing several voice circuits over one DSL line, Ameritech Illinois' revenues will, in all likelihood, decline. As noted above, recovery of loop assets requires not just current, but sustained, revenue. Am. Ill. Ex. 3.0 (Carnall) at 20-21.

[140] Even if the Commission has concerns that allocating part of the loop cost to the HFPL could cause an over-recovery of loop costs in total, the proper solution, both as a matter of law and policy, is not to set a zero price for the monthly recurring HFPL charge. Rather, the Commission should consider the issue in a separate proceeding directed at Ameritech Illinois' retail rates.

[141] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominate Carrier Networks,* Rulemaking 93-04-0003, *Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Network,* Investigation 93-04-002, California Public Utilities Commission, 2000 WL 1875844, at *11 (Sept. 21, 2000).

[142] *Application of Southern New England Telephone Company for a Tariff to Introduce Unbundled Network Elements,* Docket No. 00-05-06, Connecticut Dep't of Public Utility Control, 2001 Conn. PUC LEXIS 141, at *20 (June 13, 2001).

Washington[143] Commissions rejected CLEC attempts to set the price of the HFPL UNE at zero. In fact, the Connecticut Commission specifically found that the ILECs' "proposed allocation of 50% of the local loop costs is reasonable for the high frequency portion of the loop," and that "[t]he argument of Rhythms and other parties that the incremental cost of providing the high frequency portion of the loop is zero is not particularly useful." The same conclusion is warranted here.

b. THE ORDER'S ZERO PRICE FOR THE RECURRING MONTHLY HFPL UNE CHARGE IS DISCRIMINATORY.

The appropriate – and lawful – monthly recurring charge for Ameritech Illinois' HFPL UNE should not be set at zero, but instead must be set so as not to distort the marketplace relative to advanced services. Unless changed on rehearing, the Order's zero price for the HFPL UNE will be discriminatory in several respects and will seriously distort the competitive market for advanced services, contrary to both sound regulatory policy and the express dictates of Section 706 of the Act. The free ride that the Order gives CLECs utilizing the HFPL UNE will cause harm in the long term by denying customers the ability to choose between and among multiple service providers. Am. Ill. Ex. 3.0 (Carnall) at 13-19.

Specifically, the Order's zero price for the HFPL UNE unlawfully discriminates in favor of DSL service provided via the HFPL UNE and against other advanced services technologies, thereby giving CLECs using the HFPL UNE for DSL service an unfair competitive advantage over advanced services providers that use other technologies. Am. Ill. Ex. 3.0 (Carnall) at 2, 24; Am. Ill. Ex. 3.1 (Carnall) at 17-19. DSL is just one of several technologies that are currently competing in the advanced services marketplace. Cable modem, direct broadcast satellite

[143] *Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirteenth Supplemental Order, Washington Utilities and Transportation Comm'n, 207 P.U.R.4th 379, at *70 (Jan. 31, 2001).

("DBS"), and fixed wireless are other technologies used to provide broadband services today. Advanced services providers using these other competing technologies are paying a positive price for the facilities they use . Imposing a regulatory requirement that will allow DSL service providers to obtain for free the facilities they use provide advanced services will distort the marketplace and give DSL providers using the HFPL an unfair competitive advantage over these other advanced services providers that pay a positive price.[144] *Ibid.*

As a result, the Order will distort the CLECs' investment incentives and will discourage potential providers from developing and using alternative technologies to provide advanced services. Service providers make business decisions about whether to use HFPL technology or some other technology based in part on the cost of the assets involved. If other technologies are positively priced by the competitive market, while the HFPL, by reason of a state regulatory fiat, is priced at zero, the providers obviously will choose the HFPL. Simply put, establishing a zero price for the monthly HFPL UNE charge will have a damaging impact on the otherwise beneficial development of alternative sources of broadband services, such as broadband wireless and cable modem services. Am. Ill. Ex. 3.0 (Carnall) at 4, 24; Am. Ill. Ex. 3.1 (Carnall) at 13, 16-17. Significantly, Staff agrees that, where there are several providers of advanced services technology, it would not promote efficient competition for one provider to pay nothing for the facilities necessary to provide the service, while the other providers must pay for the necessary facilities. Tr. 1181-83 (Clausen).

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[144] The CLECs likely will argue that a zero price is necessary to avoid economic discrimination and that a positive price would establish a non-cost based price floor. As explained in the text, the exact opposite is true. A zero price for the HFPL UNE would be discriminatory in favor of data CLECs. Moreover, permitting CLECs to obtain the facilities they need to provide advanced services for free, while other providers of advanced services pay a positive price for the facilities they use to provide service, would create an artificially *low*, non-cost based floor for the HFPL UNE and would allow CLECs to undercut the prices charged by providers of advanced services using other technologies. Indeed, what the CLECs truly seek is a commission-sanctioned, artificially low cost for the HFPL UNE that they can pass on to customers in order to obtain an unfair competitive advantage in the advanced services market. Am. Ill. Ex. 3.1 (Carnall) 16-17.

The Order's zero price for the monthly HFPL UNE charge also discriminate against voice CLECs that may want to become providers of the HFPL UNE. Am. Ill. Ex. 3.1 (Carnall) at 15-17. With the availability of the HFPL UNE, CLECs are free to purchase an entire UNE loop at the TELRIC-based price and lease either the high or low frequency portion to other CLECs. If Ameritech Illinois is required to charge a monthly recurring price of zero for the HFPL UNE, it will be very difficult for a voice CLEC to sell the same product at a price greater than zero. Clearly, a data CLEC will not pay a positive price for the HFPL UNE from one supplier if it can obtain it for free from Ameritech Illinois. For all practical purposes, voice CLECs will be precluded from competing as suppliers of the HFPL UNE, and the competitive market for that UNE will not develop. In contrast, if the recurring price of the HFPL UNE is set at one-half the UNE loop rate, voice CLECs will be able to compete as suppliers of the HFPL UNE, and the market will operate to set a competitive price for the HFPL. *Id.*

Additionally, the Order's zero price discriminates against carriers that build their own facilities to provide service. Am. Ill. Ex. 3.1 (Carnall) at 19-21. A positive price for the HFPL UNE will provide the opportunity for facilities-based firms to offset a portion of their facilities investment. These facilities-based firms, however, will be denied this opportunity if Ameritech Illinois and other ILECs are required to offer the HFPL UNE for free. Indeed, under such circumstances, facilities-based carriers will have to match the zero monthly recurring price, which unfairly benefits and subsidizes CLECs using the HFPL UNE. A zero monthly recurring price will send a clear message to ILECs and CLECs that, if they invest in facilities, they will be required to subsidize carriers that choose *not* to invest in facilities. Because of the increased investment risk that facilities-based firms will face if they have to charge a zero price to attract

others to use their facilities, a zero monthly recurring HFPL UNE price will detrimentally affect countless investment decisions by potential facilities-based providers. *Id.*

The bottom line is that sanctioning a zero monthly recurring price for the HFPL UNE in a market that otherwise is fully competitive will be unlawfully discriminatory, and will serve only to distort market conditions. Nothing could be more certain proof of this potential marketplace disruption than the fact that other advanced services providers, such as AT&T, have affirmatively opposed the establishment of a zero monthly HFPL price in other proceedings, precisely because of the discriminatory and anti-competitive effects of such a price. Indeed, AT&T witness Mr. Steven Turner testified in another proceeding that:

> a zero price for HFPL is both anti-competitive and unjustified when viewed in light of the entire telecommunications market place. A zero price means that data service providers, unlike other ILEC competitors, are permitted to use the loop without contributing to the carrier-paid subsidies that support the ILEC's local service. Moreover, a zero price for the HFPL permits the CLEC to bear no cost for one of the most important assets they utilize in providing their service.

Am. Ill. Ex. 3.1 (Carnall) at 19-20.

Mr. Turner also correctly testified that a zero price for the HFPL UNE will discriminate: (1) against voice service in favor of Internet access; (2) against carriers that support universal service in favor of carriers that do not; (3) against circuit switched technology in favor of DSL technology; and (4) against facilities-based competitors, who pay the full cost of the loop, in favor of entrants that would "free ride" on a critical component of the network. As Mr. Turner put it, "setting a $0 price for the HFPL will have long-lasting negative impacts on the development of competition for this new technology." Am. Ill. Ex. 3.0 (Carnall) at 19.

c. THE ORDER'S ZERO MONTHLY RECURRING PRICE FOR THE HFPL UNE WOULD DISCOURAGE FACILITIES-BASED

COMPETITION BY CLECS AS WELL AS CONTINUED INVESTMENT IN FACILITIES BY AMERITECH ILLINOIS.

In addition to its anti-competitive effects, the Order's zero monthly recurring price for the HFPL UNE discourages facilities-based competition by CLECs, as well as continued investment in facilities by Ameritech Illinois. A fundamental economic concept underlying Congress' decision to transform local telecommunications into a competitive market is that competition will provide the proper incentives for more efficient investment and innovation. Am. Ill. Ex. 3.0 (Carnall) at 14. To achieve this result, the FCC has recognized that a regulated price should replicate a competitive price. In its *First Report and Order*, the FCC explained this rationale:

> Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier [of unbundled elements] to produce efficiently and compete effectively, which should drive retail prices to their competitive levels.

First Report and Order, ¶ 679.

The development of efficient competition requires that UNE prices provide adequate compensation to the ILEC that owns the assets. Am. Ill. Ex. 3.0 (Carnall) at 14. Again, in the *First Report and Order* (¶ 740), the FCC recognized that this goal is served by prices for UNEs that replicate competitive prices. The FCC explained:

> The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempt to replicate . . . the rates that would be charged in a competitive market.

Stated another way, in order to promote efficient investment, prices for UNEs should replicate prices that would prevail in a competitive telecommunications market. Conversely, a price for the HFPL that does not mimic the price that would reasonably prevail in a competitive market will have a disruptive negative impact on competition. Am. Ill. Ex. 3.0 (Carnall) at 15.

The prevailing monthly price for the HFPL UNE in a competitive market would not be zero. Am. Ill. Ex. 3.0 (Carnall) at 15-16. As a matter of logic and sound economic principle, a product, service or productive asset in limited supply with a positive demand will have a positive price. This is particularly true when offering a productive asset precludes the owner from using the asset, as is the case when Ameritech Illinois leases the HFPL UNE to a CLEC. Clearly, in a competitive market, a rational provider would not give up its ability to provide service using the HFPL without receiving compensation in return. *Id.* By the same token, in a competitive market, a competitor would not expect to obtain a productive and valuable asset for nothing. Yet this is precisely what the Order's proposed zero price for the HFPL UNE will allow.

Unless modified on rehearing, the negative impact of the Order's zero recurring price for the HFPL UNE on investment and innovation will be significant. Specifically, a zero recurring price for the HFPL will discourage further investment and innovation by Ameritech Illinois. It would make little economic sense for Ameritech Illinois to incur actual costs to innovate and invest in its network if it ultimately is required to turn over its facilities to competitors for free. As even AT&T's CEO has recognized, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride in the investments and risks of others."[145] Or as Justice Breyer put it, "[n]or can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) ("*IUB II*") (Breyer, J., concurring in part and dissenting in part).

[145] Remarks of Michael C. Armstrong, Chairman and CEO of AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998), available at http://www.att.com/speeches/item/0,1363,948,00.html.

In addition to discouraging future investment by Ameritech Illinois, the Order's zero recurring price for the HFPL will discourage CLECs from engaging in facilities-based competition, which is one of the primary goals of the 1996 Act. CLECs simply will have no reason to invest their own money in facilities if they can obtain them for free from Ameritech Illinois. Although unbundling obligations are useful as a stepping stone to facilities-based competition, they inevitably reduce investment incentives for both CLECs and ILECs. Again, as Justice Breyer stated, "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *IUB II*, 525 U.S. at 429.

In short, the Order's requirement that Ameritech Illinois give away something valuable for nothing, and that CLECs be allowed to get something valuable for nothing, serves only to discourage efficient investment and disrupt competition.[146]

* * *

In sum, the Order's zero monthly recurring price for the HFPL UNE is unlawful, inequitable, contrary to efficient competition, and fundamentally at odds with the pro-competitive purposes of the 1996 Act. Unless changed on rehearing, the zero price will allow data CLECs to reap a windfall through the free use of Ameritech Illinois' productive and valuable assets, at the expense of competition. In contrast, Ameritech Illinois' proposed recurring HFPL UNE price of 50% of an unbundled loop will encourage data CLECs to enter the residential market by allowing CLECs to purchase the high frequency portion of that loop at a

[146] As the California PUC found, "[i]t is unreasonable for an ILEC to sell any product or service at a zero price. Whether or not the ILECs are already recovering the full cost of the loop, it would not be acceptable to require the ILEC to 'give away' any product or service." *Rulemaking on the Commission's Own Motion to Govern Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, Rulemaking 93-04-003, Investigation 93-04-002, *Final Arbitrator's Report* (rel. May 26, 2000) ("*California Final Arbitrator's Report*") at 65.

substantial discount. Moreover, unlike the Order's zero price, Ameritech Illinois' proposed price will encourage the deployment by CLECs of their own facilities, including their own loops, where it is economical to do so. Am. Ill. Ex. 3.0 (Carnall) at 6. Along this same line, Ameritech Illinois' proposed price assures that facilities-based providers, and advanced services providers using other broadband service technologies that actually pay a positive price for the facilities that they use, are not put at a competitive disadvantage. Am. Ill. Ex. 3.1 (Carnall) at 15-19. This approach comports with the express language of Section 706 and the pro-competitive goals of the 1996 Act. The Order's zero monthly price for the HFPL UNE, on the other hand, does not.

S. OSS MODIFICATION CHARGE

The FCC has held that Ameritech Illinois and other ILECs are entitled to recover their HFPL-related OSS modification costs from CLECs. In particular, the FCC stated in paragraph 144 of its *Line Sharing Order*:

> We find that incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element.

Line Sharing Order, ¶ 144. The FCC also clearly approved the recovery of these costs by ILECs through recurring charges over a reasonable period of time. In the FCC's words:

> [T]he states may require incumbent LECs in an arbitrated agreement to recover such nonrecurring costs such as these incremental OSS modification costs through recurring charges over a reasonable period of time.

Id. ¶ 144.

Ameritech Illinois' proposed price to recover its HFPL-related OSS modification costs comports fully with these principles. Ameritech Illinois' proposed price is reasonable, complies with the *Line Sharing Order*, and accurately represents the direct incremental costs that Ameritech Illinois actually will incur to modify its OSS systems to support provisioning of the

HFPL UNE. Am. Ill. Ex. 4.1 (Smallwood) at 9-10; *see* Schedule JRS-7. Specifically, Ameritech Illinois developed this price based on the vendor's costs of implementing the HFPL-related OSS modifications, and on a product management demand forecast of the number of HFPL UNEs that will be provisioned over the next three years in SBC's 13-state serving area. *Id.* This information was then used to compute the monthly cost per line on a present value basis. No party has presented evidence that Ameritech Illinois is not incurring these costs and, in fact, in its initial Order in this docket, the Commission recognized that Ameritech Illinois incurs costs for OSS modifications. Nor has any party established that the OSS modification costs presented by Ameritech Illinois are not reasonable.

Recovering these costs over a three-year period is appropriate for several reasons. Am. Ill. Ex. 4.0 (Smallwood) at 8-9. Among other things, the broadband market is rapidly evolving with new technological developments. As a result, the longer period of time over which Ameritech Illinois spreads the recovery of these HFPL-related OSS modification costs, the more risk Ameritech Illinois faces that the OSS systems will become obsolete and that it will not recover the costs of the software upgrade. There is no good economic reason for Ameritech Illinois to bear such an undue risk of recovering the costs of a software upgrade incurred to benefit the CLEC community. It is also significant that Ameritech Illinois had to pay for the entire cost of the software upgrade *upfront*. It is not reasonable to require Ameritech Illinois to carry this cost on behalf of CLECs for any longer than three years. Additionally, given the current prices for DSL service in the retail market and the substantial monthly revenue potential for CLECs providing DSL service, Ameritech Illinois' proposed HFPL-related OSS modification charge does not constitute a barrier to entry into the advanced services market. Am. Ill. Ex. 4.1 (Smallwood) at 10-11.

The Order's requirement that Ameritech Illinois charge nothing for HFPL-related OSS modifications is directly contrary to the FCC's unequivocal holding that ILECs are entitled to recover the cost of such modifications. The Order therefore must be modified to permit such recovery. The Order identifies only one purported flaw in Ameritech Illinois' methodology — that its estimated demand for the HFPL is supposedly too low. The Order's claim was and is wrong. Ameritech Illinois developed its demand projection based on a Morgan Stanley Dean Witter report titled "The Internet Data Services Report," dated August 11, 1999. This report provided an end-of-the-year forecast for DSL lines for the years 1999 through 2009. Am. Ill. Ex. 4.1 (Smallwood) at 8; Schedule JRS-5 and 6. In fact, the projection used by Ameritech Illinois is conservatively high when compared to the actual quantity of HFPL orders received by SBC ILECs to date. The original forecast used by Ameritech Illinois assumed that there would be approximately 1.097 million SBC ILEC subscribers using the HFPL within the first twelve months of providing service. However, according to the actual number of HFPL orders billed through April 1st by SBC ILEC subsidiaries, SBC has revised its forecast to only 1.001 million orders anticipated to be received within the first twelve months. This results in only 91% of the forecasted demand used to derive the proposed OSS modification charge. Of course, if Ameritech Illinois were to use the actual HFPL demand experience of the SBC ILECs, its proposed OSS modification charge would be higher. Am. Ill. Rhg. Ex. 6.0 (Welch) at 5-6.

Although the Order does not identify what it believes to be the appropriate demand estimate for the HFPL, presumably the Order accepts the CLECs' assertion (made only in the initial phase of this docket) that Ameritech Illinois should have used the xDSL forecast included in SBC's October 1999 investor briefing. The forecast contained in the investor briefing, however, is far too high to use for the SBC 13-state forecast of demand for *line-shared* xDSL

service, for at least two reasons. Am. Ill. Ex. 4.1 (Smallwood) at 9; Am. Ill. Rhg. Ex. 6.0 (Welch) at 5; Tr. 1210-11 (Koch). *First*, this forecast is too high because it includes the xDSL lines SBC expects to serve *outside* the SBC 13-state region, not just the xDSL lines within the SBC 13-state region. *Second*, the investor briefing forecast includes *all* xDSL lines, not just line-shared xDSL lines. For example, the investor briefing forecast includes xDSL lines provided via Project Pronto and stand-alone loops. The investor briefing forecast includes all potential xDSL customers, line shared or otherwise, and therefore is too high to reflect the demand for line-shared xDSL lines in the SBC 13-state region. In short, Ameritech Illinois' demand projection is reasonable, and the forecast in the investor briefing is inappropriate to use as the forecast for demand of line shared xDSL service in the SBC 13-state region. Am. Ill. Ex. 4.1 (Smallwood) at 9; Am. Ill. Rhg. Ex. 6.0 (Welch) at 5**;** Tr. 1210-11 (Koch).

Although none of the CLECs addressed Ameritech Illinois' proposed OSS modification charge in their testimony on rehearing, the CLECs previously asserted that they should not pay for such OSS modifications because Ameritech Illinois purportedly had to make the modifications for its affiliate, AADS. This argument misses the point for at least two reasons. *First*, the FCC's *Line Sharing Order* (¶ 144) specifically allows ILECs to recover the cost of HFPL-related OSS modifications, regardless of whether they were incurred to enable affiliated CLECs, as well as unaffiliated CLECs, to gain access to the HFPL. *Second*, it is clear that Ameritech Illinois did not incur OSS modification costs solely for its affiliated CLEC to be able to submit HFPL service orders. Rather, these OSS modifications were necessary to enable *all* CLECs to submit HFPL service orders. Without these modifications, *no* CLEC could order the HFPL.

In short, the Order's requirement that Ameritech Illinois charge nothing for HFPL-related OSS modifications is directly contrary to the FCC's *Line Sharing Order* and should be modified. The HFPL-related OSS modification charge proposed by Ameritech Illinois is reasonable, consistent with the FCC's *Line Sharing Order* and should be approved by the Commission.

T. MANUAL LOOP QUALIFICATION CHARGE.

Ameritech Illinois' proposed manual loop qualification charge was developed to recover the costs that Ameritech Illinois actually incurs to perform the physical work necessary to obtain loop make-up information via the manual loop qualification process. Am. Ill. Rhg. Ex. 6.0 (Welch) at 2. Ameritech Illinois is *not* proposing a charge for the information itself, but rather only a charge to recover the costs of manually collecting loop make-up information.[147]

As explained in the direct testimony on rehearing of Mr. Welch, there are five primary work steps undertaken to perform a manual loop qualification, including:

1. Locating the appropriate wire center information.

2. Accessing LFACS (Loop Facility Assignment Center System) to locate the serving terminal and cable/pair information, and using the working telephone number or customer address as provided by the CLEC.

3. Locating the terminal in ARES (Automated Records and Engineering System), checking for the cable/pair information, running the loop, and analyzing the loop information for errors.

4. Accessing the ARES system to make the necessary corrections (if applicable).

5. Responding to the CLEC Manual Loop Request (MLR).

Am. Ill. Rhg. Ex. 6.0 (Welch) at 4. The average charge proposed by Ameritech Illinois is based on the forward-looking time necessary for a Drafter to perform the above work steps, and the hourly labor rate of the Drafter. Am. Ill. Rhg. Ex. 12.0 (Cass) at 4. The CLECs have not proposed any charge that they believe is more reasonable, nor have they demonstrated how Ameritech Illinois' proposed charge is not reasonable. In fact, the CLECs failed to submit any testimony in this rehearing on the manual loop qualification charge.

[147] Although in the initial phase of this Docket Ameritech Illinois proposed a per minute nonrecurring price for manual loop qualification, Ameritech Illinois now is proposing an average, flat-rated cost for manual loop qualification, which even Staff agrees has several advantages over a per minute charge. Staff Rhg. Ex. 2.0 (Koch) at 9-10.

In its initial Order in this docket, the Commission incorrectly found that Ameritech Illinois should not be allowed to charge for a manual loop qualification, because "loop information should have been accumulated in an Ameritech-IL databases [sic] long before now and, therefore, manual processing costs are not appropriate." Order at 84. This simply is not true.[148] As a preliminary matter, Ameritech Illinois is not required to provide loop make-up information via a mechanized process for *all* of its loops. To the contrary, the FCC specifically found that ILECs are not required to provide loop make-up information in a mechanized format if it is not available:

> "We disagree, however, with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself."

UNE Remand Order, ¶ 429.[149] The FCC also has found that SWBT, which provides loop qualification information via a manual process for a charge, is compliant with the requirements of the *UNE Remand Order*.

In any event, there is no evidence that Ameritech Illinois' databases contain loop qualification information on every loop and, even if they did, that would not mean that the mechanized loop qualification process would successfully return loop information to the requesting CLEC in every instance. Although Ameritech Illinois generally provides a high percentage of accurate information in its mechanized loop qualification system, there will be

[148] It should be noted that Ameritech Illinois had no legal obligation or business reason to collect and mechanize this information before the FCC issued its *Line Sharing Order* creating the new HFPL UNE. In other words, because the HFPL UNE did not exist prior to the FCC's *Line Sharing Order*, Ameritech simply had no reason to develop an automated database associated with a non-existent UNE.

[149] Notably, the Hearing Examiners' in Docket No. 00-0592 (at 11) recognized that Ameritech Illinois may return loop qualification information "either via an electronic interface . . . or manually (if a LEC has not complied such information for itself)" (quoting *OSS Arbitration Order* at 72).

situations where the mechanized loop qualification process is unable to return loop information to the requesting CLECs, even though the information is actually in Ameritech Illinois' systems. Am. Ill. Rhg. Ex. 6.0 (Welch) at 2. For example, Ameritech Illinois sometimes is unable to return loop make-up information using the mechanized loop qualification process, because the data in ARES do not always match-up. Am. Ill. Rhg. Ex. 6.0 (Welch) at 3.

Aside from data mismatch problems, there are two other reasons why Ameritech Illinois' mechanized loop process may not be able to return loop make-up information to a requesting CLEC. *First*, the mechanized loop process will not be successful where the Working Telephone Number is working on a Universal Digital Carrier ("UDC"). UDC is carrier equipment placed at the customer premises that will split a cable pair into more than one pair. This equipment and pair is not inventoried in ARES and, therefore, Ameritech Illinois is unable to run a mechanized loop qualification inquiry on this pair. Further, the regular cable pair cannot be passed mechanically from LFACS to ARES, because the information is contained on a remark line. *Second,* Ameritech Illinois' mechanized loop process may be unable to return loop make-up information to the requesting carrier where the loop path to the Central Office crosses a wire center boundary. The mechanized loop qualification process can only retrieve information on a loop in one wire center at a time; therefore, if a loop crosses a wire center boundary, the process would fail at the boundary due to an invalid source. Am. Ill. Rhg. Ex. 6.0 (Welch) at 3-4.

The bottom line is that Ameritech Illinois' systems occasionally will be unable to return loop qualification information electronically and, in such instances, Ameritech Illinois incurs real costs to manually gather that information for the CLECs, and Ameritech Illinois should be permitted to recover the costs.

CONCLUSION

For the reasons stated herein, Ameritech Illinois respectfully requests that the Commission revise its March 14, 2001 Order as recommended in this brief and Ameritech Illinois' Proposed Order on Rehearing.

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Respectfully submitted,

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